

Who's In and Who's Out? Can India's Answer Help Us Determine Who Qualifies for Affirmative Action?

ABSTRACT

Who should be the beneficiaries of racially targeted affirmative action? In its *Croson* decision, the Supreme Court answered part of the “Who Question” when it conditioned affirmative action eligibility on underrepresentation. What the Court did not tell us was underrepresentation of whom? The Court thus instructs us to select beneficiary groups by counting heads, but leaves open which heads get counted where and what categories to use.

By artificially separating what are necessarily related inquiries, the Court left a definitional lacuna that lower courts have struggled to fill. Such definitional issues matter because they often determine who benefits from affirmative action. Yet, the inconsistent approaches and conflicting outcomes in recent case law reveals the inadequacy of current doctrine to resolve such issues.

While commentators have largely ignored the Who Question in the US, recent comparative scholarship has drawn attention to empirical methodologies used in India. In contrast to the particularized discrimination targeted by *Croson*, India has explicitly adopted a societal approach to affirmative action that relies on empirical data to identify subordinated groups through sociological analysis. A recent *amicus* brief filed before the US Supreme Court suggested that the US adopt India's model as the answer to our Who Question.

This Article critiques the *amicus* proposal, arguing that India's approach does not provide a workable solution. Nor would it be desirable even if it could. Pressing the ambiguities of race would expose the normative incoherence of affirmative action in a way that would prove politically untenable. However, even if India's model cannot help us answer the “Who Question,” it does have some more modest uses. It offers both a definitional tool to improve the categories we count with and a model for allocating decisional authority between courts and political actors.

TECHNICAL NOTE

This Article weighs in at just over 29,000 words (29,551 total; 19,050 in text and 10,501 in footnotes; excluding abstract, table of contents, and this note).

The Article includes several data tables that are presented in graphics format. To view them in Word, please use the “reading layout” or “print layout” setting.

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One evening in February 2004, Rocco Luiere went to sleep Hispanic and woke up White—at least in the eyes of New York State. Luiere owned a construction company that bid on state highway projects. Because Luiere’s maternal grandparents were born in Spain, his company had been certified as a minority-owned business enterprise (MBE) entitled to affirmative action set asides. After doing business this way for fifteen years, Luiere learned that his MBE certification would not be renewed because New York no longer recognized people of Spanish descent as Hispanic. Denied eligibility for affirmative action, Luiere found that he could not compete for state contracts. He had to lay off a third of his workers and sell 30% of his equipment.¹

Naturally, Luiere challenged the state’s decision. After hearing his appeal, an administrative law judge noted that New York’s definition of “Hispanic” conflicted with federal standards, under which Luiere still qualified for affirmative action.² The judge’s recommendation to reinstate Luiere’s MBE certification was overruled, however, by the state program director, who held that state-funded affirmative action was not bound by federal definitions.³ Luiere then challenged the New York’s Hispanic definition on equal protection grounds in federal district court. That court denied Luiere’s request for a preliminary injunction, a ruling that was upheld on appeal.⁴

¹ John O’Brien, *State: You’re No Longer Hispanic; Definition Excludes People From Spain; Established Local Contractor Pay the Price*, POST-STANDARD, June 13, 2004, A1.

² See *In re: Appeal of Jana-Rock Construction*, Recommended Order of James F. Horan, New York State Department of Economic Development, Division of Minority and Women’s Business Development, April 5, 2004, at 7-8.

³ O’Brien, *supra* note 1.

⁴ *Jana-Rock Construction, Inc. v. New York State Dep’t of Econ. Dev.*, 5:04-CV-635, Memorandum-Decision and Order, Oct. 28, 2004 (N.D.N.Y.), at 36-37; 2006 U.S. App. Lexis 4050.

Luire's case throws into sharp relief an aspect of affirmative action rarely debated: Who should be its beneficiaries?⁵ There are at least two aspects to this question: (1) *selection*: which racial/ethnic groups qualify?⁶ and (2) *definition*: what constitutes the boundaries of such groups?⁷ This Article will refer to these problems, respectively, as the "selection question" and "definition question" and collectively as the "Who Question." It will also address a meta-question: namely, who decides the Who Question?⁸

The 1989 landmark decision by the US Supreme Court in *Richmond v. J.A. Croson Co.* dealt with the selection question by conditioning affirmative action eligibility upon a showing of underrepresentation.⁹ The Court held that underrepresentation serves to identify discrimination that, in

⁵ See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995) (noting dearth of previous scholarship). This Article focuses on voluntary affirmative action, as opposed to court-ordered remedies. While some of the analysis here will doubtless bear on the latter case, a court's equitable powers to craft a remedy present a very different normative context.

⁶ Despite the frequent inclusion of women and/or veterans in affirmative action, this Article focuses solely on racial/ethnic beneficiaries. Veterans present less classificatory challenges, as dispositive government records are generally available. Classification by gender is also less problematic than race. See *Regents of the University of California v. Bakke*, 438 U.S. at 265, 302 (1978) (Opinion of Powell, J.). This is not to say that gender never presents classificatory ambiguities in affirmative action. Hayward Lee, a private consultant on MBE certification, describes a case in which a post-operative transsexual's eligibility came under challenge. Telephone Interview with Hayden Lee of Lee Associates in San Francisco, CA (January 28, 1998).

⁷ In particular, this article focuses on definitional choices which determine which subgroups get included in standard racial categories: For example, are Iberians "Hispanic"? For reasons of space, it will set aside the classificatory challenges posed by individuals of mixed racial ancestry, cf. *DeFunis*, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting) (noting the lack of objective criteria to determine individual identities), as well as the procedural problems of determining who gets placed in which box. Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (addressing procedural challenges). In considering the Who Question, however, one should recognize that all of these dimensions are at play.

⁸ In Luire's case, the question "who decides?" was framed both as a conflict between state vs. federal standards and between courts vs. policy-makers.

⁹ 488 U.S. 469, 509 (1989). To this extent, the Court also answers the meta-question by staking out a controlling role for the judiciary to regulate the Who Question through constitutional interpretation. Technically, *Croson's* holding only applies to affirmative action to remedy past discrimination. However, a similar methodology of "counting" applies under a diversity rationale with no more clarity regarding whom to count. See Miranda Oshige McGowan, *Diversity of What?*, 55 REPRESENTATIONS 129, 130 (1996).

a particularized context, can legitimate a racially targeted remedy. What the Court did not tell us was underrepresentation of whom? In other words, the Court instructs us to select beneficiaries by counting heads, while leaving open the definitional question of which heads get counted in which column or even what the categories should be.¹⁰

Rocco Luiere's case highlights the problems posed by this lacuna: Are Iberians counted as White or Hispanic? And why is Hispanic the operative group, as opposed to, e.g., Mexican-Americans or Puerto Ricans? Such decisions matter. Underrepresentation analysis represents a black box whose output is only as reliable as the data that goes in. Furthermore, the categories we choose ultimately control who benefits. By offering a numerical formula to select beneficiaries while ignoring these definitional issues, the Supreme Court thus artificially separates what are necessarily related inquiries.

Largely ignored by scholars, lower courts have struggled to fill this definitional void. Increasingly confronted with challenges to the racial categories that define eligibility, courts have been forced to wrestle with the ambiguous nature of racial identities. Canvassing this hitherto unexplored body of case law reveals the many ways in which courts have begun to challenge the popular consensus on race. Such critical scrutiny raises concerns that our current racial "map" may be inaccurate and outdated. At the same time, the inconsistent approaches and the conflicting outcomes of these cases underscore the inadequacy of current doctrine to deal with this fundamental problem.¹¹

For example, the Seventh Circuit recently held that including Iberians-Americans like Rocco Luiere in affirmative action violated the

¹⁰ The Court did offer some cryptic hints. *See infra* notes xx and accompanying text.

¹¹ *See infra* notes xx and accompanying text.

narrow tailoring prong of strict scrutiny.¹² Defining a “Hispanic” category this way was deemed overinclusive. Judges in the Eleventh Circuit reached the opposite conclusion—on the same question.¹³ Meanwhile, the Fifth Circuit suggested that counting only Mexican-Americans could be *underinclusive*.¹⁴

Our uncertain approach to the Who Question has important real world consequences that transcend mere definitional ambiguities. The original beneficiaries of affirmative action, African-Americans, now constitute a minority among minorities, while affirmative action benefits go—disproportionately¹⁵—to newer immigrant groups instead. *Croson*’s insistence on particularized underrepresentation also penalizes groups such as Native Americans whose numbers are often too small to generate statistically meaningful evidence. Conversely, counting with broad categories leads to other problems. For example, because Asians as a whole are no longer underrepresented in higher education, Asian subgroups who *are* underrepresented are denied affirmative action.¹⁶

These problems are symptomatic of the larger failure of equality discourse to look beyond Black and White and acknowledge the full

¹² Builders Ass’n of Greater Chicago v. Cook Cty, 256 F.3d 642, 647 (7th Cir. 2001).

¹³ See Peightal v. Metropolitan. Dade County, 26 F.3d 1545, 1560 (11th Cir. 1994).

¹⁴ Hopwood v. Texas, 78 F.3d 932, 948 n.37 (5th Cir. 1996).

¹⁵ In 1993, Black-owned construction companies received less than a fifth of federal highway set-asides, and in 1996 garnered only a third of the SBA minority business funding—less than the share of their proportional representation among US minorities would justify and roughly half their share from a decade earlier. Asian-Americans claimed almost as much SBA money as African-Americans despite having half the population. HUGH DAVIS GRAHAM: COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 164 (2002); see also George R. LaNoüe, *The Impact of Croson on Equal Protection Law and Policy*, 61 ALBANY L. REV. 1 (1997) (noting slower growth rate of Black-owned minority businesses compared to other minorities will mean continued decline in African-American share of MBE benefits); Malamud, *supra* note xx, at 321 (describing the predominant share of minority scholarships going to nonblacks); Graham, *supra* this note, at 192, 197 (describing how many employers have added “diversity” to their workforce by hiring Hispanic or Asian immigrants at the expense of African-Americans).

¹⁶ See *infra* notes xx and accompanying text.

spectrum of ethnic color in America.¹⁷ Existing racial taxonomies have grown inadequate to deal with the complexities of our diverse population. Yet, the paradigmatic role of African-Americans in debates over racial equality often masks the ambiguities posed by other groups.¹⁸ Meanwhile, constitutional discourse on equality operates at a level of abstraction in which the Who Question is bypassed entirely.¹⁹

Recently, commentators have begun to look elsewhere for fresh ideas on affirmative action. In particular, India has attracted the attention of both leading constitutional law scholars²⁰ and social scientists.²¹ In contrast to the particularized discrimination targeted by *Croson*, India has explicitly adopted a societal approach to affirmative action that *Croson* rejected. By reconceptualizing affirmative action as a project dedicated to eradicating societal hierarchies, India not only illustrates “the path not taken” in the US, it offers a working model of the anti-subordination approach to equality long advocated by constitutional scholars and critical race theorists.²²

Selecting beneficiaries under this approach becomes an exercise in locating patterns of disadvantage. Intriguingly, India has developed a sophisticated methodology to identify subordinated groups through

¹⁷ Alex Saragoza, et. al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L. J. 1, 4-10 (1992).

¹⁸ *Id.*; Daniel Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 894 (1994); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 962-64 (1995).

¹⁹ Cf. Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311, 1313 (1999).

²⁰ E.g. *id.*; Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004).

²¹ Clark D. Cunningham, Glenn C. Loury, & John David Skrentny et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835 (2002) [Hereinafter *the amicus scholars*]; SUNITA PARIKH, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (1997).

²² Clark D. Cunningham & N.R. Madhava- Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1302-1305 (1999); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind*, 44 STAN. L. REV. 1, 46 n.184 (1991).

empirical analysis. India thus illustrates a sociologically targeted answer to the Who Question that the US could learn from.²³

A recent *amicus* brief filed by comparative scholars before the US Supreme Court explicitly advocated that the US adopt India's societal approach to the Who Question.²⁴ This Article critiques the *amicus* scholars' proposal—and, by extension, the broader literature on anti-subordination—by examining the practical and normative difficulties in implementing such a model. It argues that India's approach does not provide a workable basis to select beneficiaries, nor would it be desirable even if it could.²⁵

Whereas critical scholars often attribute the “decontextualized” reading of racial equality in Supreme Court precedent to ideological hostility to race-consciousness,²⁶ this Article will argue that with regard to the Who Question the opposite applies. Pressing the ambiguities of race would expose the normative incoherence of affirmative action in a way that would prove politically untenable. The Court therefore deflects the Who Question in order to preserve the status quo under which affirmative action can continue to function.²⁷

That said, strict scrutiny does not permit such definitional issues to be bypassed entirely. The Supreme Court's avoidance of the Who Question has led to doctrinal confusion among the lower judiciary. This Article suggests an analytic framework to improve on our current approach. In this regard, it proposes some modest applications of the Indian model, both as a

²³ See LAURA DUDLEY JENKINS, *IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED* (2003); MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984).

²⁴ Brief *Amicus Curiae* of Social Science and Comparative Law Scholars in *Adarand Constructors, Inc. v. Mineta*, 2000 U.S. Briefs 730 (June 1, 2001). Three of these scholars expanded upon the insights of their brief in a law review article. Cunningham, Lory, & Skrentny, *supra* note 18. Citations to “the *amicus* scholars” will refer to this latter work.

²⁵ See *infra* notes xx and accompanying text.

²⁶ See, e.g. Gotanda, *supra* note 19, at 46.

²⁷ See *infra* notes xx and accompanying text.

definitional tool and as a means of allocating decisional authority to decide the “Who Question.”²⁸

The argument proceeds in four parts. Part I begins with an overview of the ambiguous and contested nature of the racial/ethnic categories and presents empirical data demonstrating inconsistencies in the racial definitions used in affirmative action. It then traces the historical origins of affirmative action and shows that both the development of race-conscious government policies as well as the categories used to implement them occurred more in the manner of ad hoc improvisation than through any guiding principle or intent. Part I next explores how constitutional equality law has responded, from the Supreme Court’s agnosticism on the selection question to its virtual silence on the definition question, leaving in place a popular consensus approach to race by default. Using US Census data to demonstrate the internal heterogeneity of standard racial categories, Part I challenges this popular consensus and calls into question their utility for allocating affirmative action remedies. Finally, it demonstrates the confusion that has resulted as lower courts have attempted to redefine race “functionally” in a manner that comports with the narrow tailoring requirements of strict scrutiny.

Part II then introduces the Indian model as a possible alternative approach. It illustrates how the model might be applied in practice to the US context, again using Census data to dissect racial categories socio-economically by subgroup. Doing so raises both methodological and demographic challenges. In particular, Part II highlights the uncertain connection between immigration and ethnic disadvantage. Part II also explores prudential risks in embracing Indian methodology. The Who Question can be divisive; it can heighten race-consciousness in ways that

²⁸ See *infra* notes xx and accompanying text.

may have unintended repercussions. Furthermore, the normative incoherency of US affirmative action limits our ability to answer the Who Question with any precision. Forced attempts at clarity might prove counterproductive. Ultimately, Part II argues that the Supreme Court's avoidance of the Who Question rests on a political calculus in which ambiguity represents the price of our continued commitment to race-conscious affirmative action.

The argument for ambiguity, however, is not absolute. Part III explores the need to strike a balance between competing jurisprudential concerns. Recent case law threatens to make continued avoidance of the Who Question untenable. As lower court begin to take a skeptical look at the categories used to allocate affirmative action remedies, the prudential tradeoffs between clarity and ambiguity will need to be addressed. Even if India's model cannot answer our Who Question, it could still help us improve on the status quo. To this end, Part III proposes some practical applications of Indian methodology with regard to the definitional issues of race: It argues for a more differentiated analysis of ethnic subgroups and local context and encourages consideration of systemic disadvantage as a threshold test to improve the categories we count with. Part III also reflects on the meta-question of whether courts should "constitutionalize" the Who Question or leave it to political bodies to muddle through. It considers India's hybrid approach of "bounded discretion" as a possible solution. Following Part III, the Article concludes.

I. Categorical Confusion and Constitutional Silences

A. Identities in Flux

Rocco Luiere's experience is hardly unique. The Hispanic classification varies across jurisdictions; even within the same region, different entities may recognize different groups.²⁹ The definitional boundaries of Hispanic-ness have already been litigated in several affirmative action contexts, with the inclusion of Iberian-Americans proving particularly contentious.³⁰ San Francisco's Civil Service Commission fielded an especially heated debate on the issue. Advocates of a narrow definition argued that, far from being historically oppressed, Spaniards were responsible for the destruction of indigenous cultures in Latin America. Opponents countered by stressing the historical ties of language and culture that Spaniards shared with other Hispanics.³¹ The two sides also disputed the extent to which Iberians experience the same discriminatory animus directed against *Latinos*. The anti-Iberian camp contended that the paler complexion and European features of Iberians allowed them to blend in with the White majority. Iberian defenders emphasized characteristic accents and surnames that mark Iberians as Hispanic and expose them to prejudice.³²

²⁹ See Table I (illustrating variation in Hispanic definitions across jurisdictions). The data presented are drawn primarily from a survey of municipal MBE programs conducted in 2004 by and on file with the author.

³⁰ See *infra* notes xx and accompanying text.

³¹ Alex Saragoza, et. al., *supra* note xx, at 2.

³² This argument had prevailed a decade earlier when Iberian contractors successfully lobbied for inclusion in federal affirmative action set-asides. Prior to that point, the Hispanic category had generally been thought of as including Europeans. See *infra* notes xxx and accompanying text.

Table I - Who is Hispanic?

Name of Jurisdiction	Spaniards	Portuguese	Other Latin American
Atlanta	No	No	Yes
Baltimore	Yes	Yes	Yes
Boston	No	No	Yes
Miami	Yes	Yes	Yes
New York	No	No	Yes
Oakland*	Yes	No	Yes
Richmond*	Yes	No	Yes
San Francisco*	No	No	Yes
San Jose*	No	No	Yes
Small Business Administration	Yes	Yes	Yes
US Census**	Yes	No	Yes
Stanford University	No	No	Only Mexican-American and Puerto Rican
Univ. of Texas[†]	No	No	Only Mexican-American

* Pre 1996

† Pre 1995

** US Census treats Hispanic classification as an ethnic identity independent of its racial categories

Nor are Hispanics the only affirmative action group to inspire such definitional debates. The boundaries of the “Asian Pacific” classification are equally variable and contested.³³ Ohio courts fielded a flurry of litigation when the state MBE program decided that contractors from India and Lebanon no longer qualified. The case of Lebanese-American contractor Nadim Ritchey went all the way to the Ohio Supreme Court. (He lost).³⁴ Oregon administrators wrestled with similar ambiguity when a Kazakhstani contractor claimed eligibility.³⁵

Even African-American has become a contested category. Commentators have questioned whether Black immigrants should qualify for affirmative action. This debate was fueled by recent studies showing

³³ Formal definitions of the “Asian” category vary widely. Some exclude Subcontinental Asians or Filipinos; others out leave Pacific Islanders and/or Native Hawaiians. Some include Afghanis; the city of Charlotte also included Persians. See McGowan, *supra* note xx, at 130; George LaNoe, *Standards for the Second Generation of Croson-Inspired Studies*, 26 URBAN LAWYER 485, 491 (1994).

³⁴ Ritchey Produce Co. v. State, 707 N.E.2d 871, 927 (Ohio Sup. Ct. 1999). The federal Sixth Circuit Court of Appeals had the last laugh, however, striking down the entire MBE program as unconstitutional. Assoc. Gen. Contractors of Ohio v. Drabik, 214 F.3d 730 (6th Cir. 2000).

³⁵ Telephone Interview with Jill Miller, Certification Specialist, Oregon Office of Minority, Women, & Emerging Small Business, Portland, Oregon (May 27, 2004).

that 40% of African-American students admitted at Harvard and other elite universities were immigrants or children of immigrants.³⁶ Studies have also shown that employers in New York City are much more willing to hire Jamaicans and Africans than non-immigrant Blacks.³⁷ “African-ness” is itself contested. Teresa Heinz Kerry faced ridicule for implying that her (Caucasian) *Africaner* heritage made her “African-American.”³⁸ Yet, racial distinctions in Africa are not always so clear-cut. Affirmative action programs typically define Black Americans in circular fashion as descended from “black racial groups.”³⁹ MBE programs have therefore struggled to decide whether Sudanese and Ethiopians qualify as “Black.”⁴⁰

Meanwhile, other ethnic groups currently classified as White have sought “minority” status in part to gain inclusion in affirmative action. While Middle-Eastern-Americans lobbied unsuccessfully for census recognition in 2000, they did win eligibility for affirmative action in San Francisco. French-Acadians were eligible in Louisiana. City University of New York at one point recognized Italian-Americans.⁴¹ Congress championed rural Appalachian Whites as equally deserving.⁴² And while Hasidic Jews failed to win recognition from the Small Business Administration (SBA), they are included in other federal affirmative action

³⁶ Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones*, N.Y. TIMES, June 24, 2004 at A1.

³⁷ See Jennifer Lee, *The Racial and Ethnic Meaning Behind Black*, in John David Skrentny, ed., *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 184 (2001) [Hereinafter, *Color Lines*].

³⁸ Maureen Dowd, *Out of Africa*, N.Y. TIMES, July 18, 2004, at 14.

³⁹ E.g. 49 C.F.R. pt. 26 (199); 13 C.F.R. 124.103.

⁴⁰ Interview with Hayden Lee, *supra* note xx. Cf. *The World Notices Darfur*, THE ECONOMIST, July 31, 2004, at 39 (describing racial ambiguities in Darfur).

⁴¹ DVORA YANOW, *CONSTRUCTING “RACE” AND “ETHNICITY” IN AMERICA* 67 (2003).

⁴² See George LaNoue & John Sullivan, *Presumptions for Preferences: The Small Business Administration’s Decisions on Groups Entitled to Affirmative Action*, 6 J. POL’Y HIST. 439, 443 (1994) [hereinafter *Presumptions*] (describing legislative history to Congressional authorization of federal MBE program).

contexts.⁴³

As America's population grows ever more diverse, such categorical conundrums will continue to multiply. At root lies the simple fact that race and ethnicity are not biological absolutes, but social constructions whose contours are amorphous, contingent, and inherently contestable.⁴⁴ As one court summarized: "Race is politics, not biology."⁴⁵ It may be tempting to dismiss such definitional disputes as the normal cut and thrust of identity politics. Yet, as Rocco Luiere reminds us, there are tangible benefits at stake on which people's livelihoods depend. Administrators of affirmative action programs have to wrestle with the uncertainties and ambiguities of race to determine who's in . . . and who's out.

Increasingly, such disputes are finding their way into the courts. If you're a judge assigned to such a case, how do you decide? What does it mean, e.g., to be "Hispanic" for purposes of affirmative action? Faced with such questions, courts have tried all manner of approaches: They have consulted dictionaries⁴⁶ and turned to legislative history.⁴⁷ Some treat "Hispanic" as a question of ancestry; others stress language, culture,⁴⁸

⁴³ Compare LaNoue & Sullivan, *Presumptions* at 449, with Congressional Research Service, COMPILATION AND OVERVIEW OF FEDERAL LAWS AND REGULATIONS ESTABLISHING AFFIRMATIVE ACTION GOALS (1995) (citing 48 C.F.R. § 2426.101 (1994)). Hasidic Jews were also eligible for other SBA programs at some point. LaNoue & Sullivan, *Presumptions*, *supra* note xx, at 461.

⁴⁴ The idea that humanity can be classified into biological substrata based on phenotypic attributes has long ago been discredited. See *Houston Contractors Ass'n v. Metro. Transit Auth. of Harris County*, 993 F. Supp. 545, 546 (S.D. Tex. 1997); Ian F. Haney López, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). Even if a new understanding of "scientific race" should emerge from our exploration of the human genome, the particular color lines drawn in the US are more likely to reflect our own contingent history.

⁴⁵ *Houston Contractors*, 993 F. Supp. at 546.

⁴⁶ *Ritchey Produce Co. v. State*, 707 N.E.2d 871, 927 (Ohio Sup. Ct. 1999).

⁴⁷ *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (defining race in part based on popular understandings at the time Section 1981 was enacted).

⁴⁸ *Lagrua v. Ward*, 519 N.Y.S.2d 98, 99 (N.Y. Sup. Ct. 1987).

history,⁴⁹ discrimination,⁵⁰ or even physical appearance.⁵¹ For some courts, defining the boundaries of “Hispanic” is like asking where blue ends and green begins; they dismiss the category as meaningless.⁵²

As noted, courts have reached inconsistent rulings regarding affirmative action eligibility. If you read these opinions, there seems little driving them besides the judges’ underlying intuitions. Judge Posner states flatly that Iberians haven’t been victims of discrimination and challenges the defendant to produce evidence to the contrary.⁵³ The Eleventh Circuit reverses the burden of proof, requiring the *plaintiff* to prove that Iberians don’t belong.⁵⁴ Meanwhile, the Fifth Circuit simply assumes the underinclusiveness of Mexican-Americans is self-explanatory.

What is clear about these cases is that we don’t have a good way to answer the Who Question. Indeed, the Who Question has been conspicuous by its absence from affirmative action discourse.⁵⁵ African-Americans are increasingly losing out to newer immigrant groups with no history of *de jure* discrimination.⁵⁶ Yet, we continue to view affirmative action almost

⁴⁹ *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001).

⁵⁰ *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954).

⁵¹ *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3rd Cir. 1991). *See also* *Peightal v. Metro. Dade County*, 940 F.2d 1394, 1408-09 (11th Cir. 1991) (opinion of Judge Brown).

⁵² *Concrete Works of Colo., Inc. v. Denver*, 86 F. Supp. 2d 1042, 1069 n.17 (D. Ct. Colo. 2000) (describing Hispanic as an inherently indeterminate category for which “there is no agreed working definition”); *Alen v. State*, 596 So.2d 1083, 1084-85 (Ct. App. Fl. 1992) (questioning whether Hispanics constitute a judicially cognizable ethnic group for jury selection purposes).

⁵³ *Builders Ass’n*, 256 F.3d at 647.

⁵⁴ *Adarand*, 228 F.3d at 1164.

⁵⁵ Most debate focuses on whether racial preferences in general are morally or constitutional defensible. More recently, commentators have questioned whether such policies actually work as intended—Compare Richard Sanders, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (arguing that affirmative action harms beneficiaries by promoting them beyond their abilities), with WILLIAM G. BOWEN & DEREK BOK, *SHAPE OF THE RIVER* (2004) (contrary view).

⁵⁶ *See supra* note 17.

exclusively in Black and White terms, with other groups acknowledged—if at all—through vague euphemisms such as “people of color.”

Whether you agree or disagree with affirmative action, the fact is it exists—we’re doing it. So why don’t we question which groups get included? Are we avoiding the Who Question because talking about race makes us uncomfortable? Are we afraid of seeming politically incorrect? Is it intellectual laziness? Bureaucratic inertia? Or are there deeper, perhaps more principled reasons that underpin our current laissez faire approach? To answer these questions, we need to understand how affirmative action began and how we inherited the racial categories we have.

B. Unholy Genesis: The Quadrangle in Historical Context

The modern era of race consciousness in government policy emerged as an outgrowth of the civil rights movement. Beginning with early efforts to promote equal opportunity and evolving into outright racial quotas, the federal government increasingly began to design social policy around race. Although the US Census had kept statistics on race for over a century using varying categories, federal agencies suddenly had a need to collect detailed racial data across a wide range of contexts. Federal statisticians therefore devised new standardized categories to record such data. To some extent, the categories devised by federal statisticians for such purposes tracked preexisting markers of identity—the “classic color codes” of an earlier era of *de jure* racism.⁵⁷ However, as US residents became accustomed to checking off boxes classifying themselves as White, Black, Asian, Indian, or Hispanic, a new popular consensus emerged around this national blueprint on race.⁵⁸ Moreover, the “classic color codes” soon

⁵⁷ David A. Hollinger, *Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action*, in 55 REPRESENTATIONS 31, 33 (1996).

⁵⁸ *Id.*

expanded to “color in” all sorts of new immigrant groups whose racial identities may have been ambiguous upon arrival (and occasionally “recolored” existing groups).

Prior to this time, the boundaries of race had remained ill-defined and were often regionally specific.⁵⁹ Conceptions of race continued to evolve as ethnic minorities such as “Jews” and “Irish,” initially stigmatized as racial outsiders, gradually assimilated into the White “majority.”⁶⁰ Thus, as Justice Powell observes in *Bakke*, “[t]he concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments.”⁶¹

This process of racial redefinition continues today. The 2000 Census’ decision to recognize a new “Pacific Islander” category augurs the birth of a distinct racial identity, and lobbying continues for an as-yet unrecognized “Middle-Eastern-American” grouping.⁶² What is different now is the stakes that attach to such categorical definitions. In the age of identity politics, race offers a powerful mobilizing strategy to gain political influence and extract government rents.⁶³ Yet, despite such tangible stakes in the “market for identities,” the construction of racial identities has been

⁵⁹ Graham, *supra* note xx, at 40, 42. Thus, the Irish in Boston were often treated worse than Negroes, but less ostracized elsewhere. Similar focal-points of hostility faced, e.g. Mexicans in Texas and Chinese in California. *Id.*

⁶⁰ See NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); *St. Francis*, 481 U.S. at 610 (“Plainly, all those who might be deemed Caucasian today were not thought to be of the same race [in the 19th century]”).

⁶¹ *Bakke*, 438 U.S. at 295.

⁶² YANOW, *supra* note xx, at 39-40.

⁶³ The tangible benefits attached to “minority status” help to explain the reverse trajectory which racial redefinitions now follows. In the old “melting pot” model, ethnic immigrants (mostly European) shed their racialized “otherness” to blend into the undifferentiated mass of hyphenated-Americans we now label “White.” Today, ethnic groups such as Mexicans and South Asians who formerly claimed “White” identities now consciously espouse identities of “color.” A similar attempt at redefinition is in process for Arab-Americans. With affirmative action hinging on minority status, “Whiteness” has become devalued in the “market for identities,” and supply has adjusted to meet demand.

mediated through obscure bureaucratic processes operating largely outside the public eye.⁶⁴

Several recent studies have shed light on the historical genesis of our current racial consensus.⁶⁵ Three main themes emerge: First, the categories we use were created in largely ad hoc fashion without study or debate. Second, once established, the standardized definitions were blindly propagated without further inquiry. Third, while the original categories centered on groups with undeniable histories of persecution, they soon expanded to embrace newer immigrant groups with more tenuous claims to inclusion.

Like the Civil Rights Movement from which it sprang, affirmative action initially focused on redress for one group, African-Americans, reflecting the moral imperative of slavery and Segregation.⁶⁶ Not only did African-Americans present the most compelling claim to racial justice, for all intents and purposes, they were the *only* racial minority of national significance.⁶⁷

Nonetheless, federal policy-makers were soon persuaded by Hispanic and Asian leaders to bring their groups under federal protection.⁶⁸ An 1956 guideline for gathering racial statistics on employment and

⁶⁴ See GRAHAM, *supra* note xx, at 140.

⁶⁵ See LaNoue, *Presumptions*, *supra* note xx; GRAHAM, *supra* note xx; JOHN DAVID SKRENTNY: MINORITY RIGHTS REVOLUTION (2002).

⁶⁶ Lyndon Johnson famously justified affirmative action by evoking the imagery of slavery. “You do not take a person who for years has been hobbled by chains and liberate him, bring up to the starting line of a race and then say, ‘You are free to compete with all the others.’” Graham, *supra* note xx, at 77. In this sense, affirmative action can be seen as yet another milestone in a progression of political reforms animated by concern over African-Americans from the Thirteenth Amendment to the 1964 Civil Rights Act. *Id.* at 143-44, 173.

⁶⁷ David Lauter, *Minorities Adding up to a Majority*, TIMES UNION (Albany, NY), April 12, 1995 at E1. Other groups were mostly limited to a regional presence—Chinese and Japanese-Americans on the West Coast, Mexican-Americans in the Southwest, and Puerto-Ricans in the Northeast. GRAHAM, *supra* note xx at 104.

⁶⁸ *Amicus* scholars, *supra* note xxx at 860-61.

contracting suggested “Spanish-American,” “Oriental,” “Indian,” “Jewish,” and “Puerto-Rican” as categories.⁶⁹ The 1962 “Standard Form 40” dropped Jews and combined Puerto-Ricans with other Spanish-Americans. Widely copied, the form constituted a quasi-official standard propagated throughout the federal government in a variety of contexts.⁷⁰

The process of determining who made it onto these lists and who got left out was largely left to mid-level civil servants acting with little or no policy guidance. They made almost no effort to elicit public input, or examine empirical data, or rely on any sort of “scientific” selection process.⁷¹ Instead, categories were chosen in essentially ad hoc fashion, with little thought as to their long-term consequences.⁷²

Once the lists were created, the groups included quickly assumed the status of “official” minorities,⁷³ an ethno-racial “quadrangle” comprised of Blacks, Hispanics, Indians, and Asians. The Hispanic category, in particular, crystallized a new popular understanding of race. The Mexican-Americans of the American South-West, the Northeast’s Puerto Ricans, and Florida’s Cubans had rarely thought of themselves, or been thought of by others as constituting a single group until somebody decided to lump them into single statistical category of “Spanish-Americans,”⁷⁴ Political

⁶⁹ SKRENTNY, *supra* note xx.

⁷⁰ Graham describes how Standard Form 40 begat the EEOC’s 1965 EEO-1, which required employers nationwide to count heads using the same four categories. The EEO-1 in turn served as the basis for the four groups singled out for preference under the 1971 Philadelphia Plan and the 1973 SBA 8(a) Program. GRAHAM, *supra* note xx, at 137-139. By 1980, the Office of Management & Budget (OMB)’s Directive No. 15 had made these standard groupings mandatory for all federal agencies gathering statistics based on race. YANOW, *supra* note xxx at 37.

⁷¹ LaNoe & Sullivan, *Presumptions*, *supra* note xxx.

⁷² GRAHAM, *supra* note xxx at 134, 136. The choices were also partly influenced by instrumental constraints. For example, EEOC categories were intended to be used by employers classifying their workforce through visual inspection. White ethnic groups, who would be more difficult to distinguish visually, were not included partly for this reason. *Amicus* scholars, *supra* note xxx at 862-63.

⁷³ *Amicus* scholars, *supra* note xxx at 859-867.

⁷⁴ *Id.* at 879 n.258. The artificiality of this new grouping was underlined by the initial

considerations also factored into these categorical choices, as with the Nixon White House's lobbying to include Cubans in the nascent Hispanic category to curry favor with this loyal bloc of Republican voters.⁷⁵

The stakes attached to such categorical machinations rose dramatically following the 1960s race riots when "soft" affirmative action focused on ensuring equal opportunity hardened into overt racial preferences.⁷⁶ With race now used explicitly to allocate government resources, it suddenly mattered more who was included among the favored groups. As Black Americans were the main protagonists in the riots, they were the universal focus of efforts at redress.⁷⁷ Yet, the other designated "minorities" found themselves included in federal remedies as well since no one wanted to undertake the contentious task of selecting between them.⁷⁸ Existing category definitions thus past seamlessly into this new context, and the definition question answered the selection question by default.

As preferential programs continued to proliferate in a diversity of contexts, the categories of the quadrangle went with them, with no one

confusion as to what to call it: Spanish-Americans, Spanish-Speaking Americans, and Spanish-Surnamed Americans all vied for contention (each of which, taken literally, would embrace slightly different constituencies). Moreover, Puerto Ricans remained excluded from early definitions of this group. Only in 1976 was the category rechristened "Hispanic." GRAHAM, *supra* note xx, at 139 n.16.

⁷⁵ George LaNoue & John Sullivan, *Deconstructing the Affirmative Action Categories*, 41 AMERICAN BEHAVIORAL SCIENTIST 913, 915 (1998). The Cuban community at that time was composed primarily of wealthy exiles, predominantly of European extraction, who had fled Castro's expropriations. *Id.* Conversely, the omission of Jews seems to have been prompted in large part by opposition from African-Americans. GRAHAM, *supra* note xx, at 137; La Noue, *Presumptions*, note xx.

⁷⁶ Such riots persuaded government and industry leaders that rapid hiring of African-Americans was to be the price of racial peace. Racial preferences were the logical tool. GRAHAM, *supra* note xx, at 137-38, 173.

⁷⁷ The 1967 Kerner Commission investigating the race riots concluded that "special encouragement" was needed to guide Blacks into the economic mainstream. No other groups were discussed. LaNoue & Sullivan, *Presumptions*, *supra* note xxx at 442. Similarly, the Labor Department held hearings in 1969 to document discrimination against Black workers to justify its "Philadelphia Plan" for racially preferential hiring. No record was made of discrimination against other minority group at the hearings. GRAHAM, *supra* note xx, at 139.

⁷⁸ LaNoue & Sullivan, *Presumptions*, *supra* note xx, at 440, 443.

bothering to reinvent the definitional wheel.⁷⁹ Local governments had a built-in incentive to adhere to federal standards as they were obliged to use federally-recognized categories on project receiving federally funds.⁸⁰

However, while the standard categories have remained largely fixed since the 1960s, the groups included *within* these categories have expanded over time. Once the category of “Spanish-Speaking Americans” was renamed “Hispanic,” it expanded to include groups such as Brazilians who don’t even *speak* Spanish.⁸¹ While Mexican- and Puerto Rican-Americans had the main historical claims to redress, once Nixon let in Cubans, other Latin-Americans simply rode their coattails. Even Spaniards and Portuguese—initially regarded as “Europeans”—successfully lobbied for federal reclassification as “Hispanic.”⁸²

Similarly, the “Oriental” category began with a focus on Japanese- and Chinese-Americans as the main victims of historical discrimination in the US. Rebranded as “Asian,” the category rapidly expanded to include other East and Southeast Asians as well as a broad swath of the South Pacific before veering westward to envelop “Subcontinental Asians.”

This steady inflation of existing categories has been largely driven by immigration.⁸³ The Asian Pacific Islander (API) category, for example,

⁷⁹ LaNoue & Sullivan, *Deconstructing*, *supra* note xx, at 914. Almost every federal agency has its own form of affirmative action—from the Defense Department to the Environmental Protection Agency—and virtually all adhere to the quadrangle. See Congressional Research Service, COMPILATION AND OVERVIEW OF FEDERAL LAWS AND REGULATIONS ESTABLISHING AFFIRMATIVE ACTION GOALS OR OTHER PREFERENCES BASED ON RACE, GENDER, OR ETHNICITY, February 17, 1995 (providing comprehensive list of federal affirmative action programs).

⁸⁰ It makes sense to use federal categories even when administering purely local programs to avoid duplication of standards and enable reciprocity in MBE certifications.

⁸¹ See *Alen v. State*, 596 So. 2d 1083, 1094 (Ct. App. Fl. 1992) (noting the South American “Hispanics” can also be from Belize, and British and French Guyana—none of which speak Spanish or Portuguese); see also GRAHAM, *supra* note xx, at 191 (questioning inclusion of Belize, Surinam, Guiana as non-Spanish speaking nations).

⁸² 49 C.F.R. pt. 23 (1999).

⁸³ GRAHAM, *supra* note xx, at 95. The 1965 Immigration Act paved the way for a

now embraces almost half the world's population. Lacking a history of persecution in the US, the new "immigrants of color" justified their inclusion by claiming a racial kinship that allowed them to assimilate into existing categories.⁸⁴ Acceptance of such claims has been largely "a matter of bureaucratic convenience rather than careful ethnographic analysis."⁸⁵ Its main premise seems to have been proximity of geographic origin. In what other sense can Samoans be said to be ethnically "like" Chinese? Or Vietnamese "related to" Pakistanis?

Such putative commonalities tells us nothing about whether and how these groups have experienced racial disadvantages *in the US*, which was the standard that the SBA had ostensibly established for eligibility in affirmative action. As the central arbiter of these categorical redefinitions, the SBA made no effort to independently examine actual evidence of US disadvantage.⁸⁶ As a result, the application of its stated criteria smacked of double standards. It turned down Persian-Americans who had demonstrated undeniable evidence of racial prejudice on the ground that the record presented was insufficiently "longstanding,"⁸⁷ while letting in others, such as Tongans, who made even less of a showing.⁸⁸ Moreover, the SBA designated as "disadvantaged" Asian Indians, "one of the best-educated and

massive influx of immigrants from the developing world. Two decades later, African-Americans had gone from being the overwhelming majority of America's nonwhite population to become a minority among minorities. *Id.*

⁸⁴ LaNoue & Sullivan, *Presumptions*, *supra* note xxx at 460.

⁸⁵ *Id.* at 459.

⁸⁶ LaNoue, *Presumptions*, at 451, 463. The SBA seems to have paid little attention to relevant data even when presented as part of a petition. *Id.* at 450 (observing that data on business ownership and revenues included in the petition by Asian Indians did not demonstrate disadvantage, but rather the opposite).

⁸⁷ *Id.* at 456 (citing evidence of fervent anti-Persian sentiment in the aftermath of the Iran Hostage Crisis).

⁸⁸ A 1986 petition by Tongans admitted that—far from facing discrimination—"the main reason for their social disadvantage was '[their] general lack of the English language' because many Tongan immigrants were older and had difficulty learning English." LaNoue & Sullivan, *supra* note xxx, at 453.

most prosperous groups in the country” and previously regarded as Caucasian.⁸⁹

Once the petition by Indians was approved, the SBA let in other “Subcontinental Asians” without even being asked.⁹⁰ Letting in Pakistanis because they are “like” Indians raises the inevitable question: Why not Afghanis or Persians? Fearing such a domino effect of geographic extrapolations, the SBA drew an arbitrary line at the Khyber Pass. On one side of the line, Pakistani-Americans are considered racially “Asian” and hence “disadvantaged.” On the other, Persians and Afghani-Americans are relegated to “Whiteness” and presumptively ineligible for affirmative action—a distinction to which almost all affirmative action programs continue to adhere. No findings were ever made to justify this abrupt—and etymologically perverse⁹¹—termination of “Asia Pacifica” in mid-Continent.⁹²

The trial judge hearing Lebanese contractor Nadim Ritchey’s challenge to Ohio’s MBE program found this truncated geography preposterous.

Working our way north and west from India we first come to Pakistan, then Iran, the Iraq, then Syria, and finally Lebanon. If Asian Indians are “Oriental,” shall we exclude Pakistanis separated from India only by the Great Indian Desert? And if Pakistanis are “Oriental,” shall we exclude Iranians who share a common border with Pakistan? And if Iran, is “Oriental,” shall we exclude Iraq separated from Iran only by the Zagros Mountains? And if Iraq is “Oriental,” shall we exclude Syria for the Euphrates River flows

⁸⁹ *Id.* at 451.

⁹⁰ LaNoe & Sullivan, *Presumptions*, *supra* note xxx at 452.

⁹¹ The continent of Asia originally obtained its name from the Roman province of Asia in modern Turkey, which today falls on the wrong side of the SBA’s line. John Richards, *Recent Patent Law Developments in Asia*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599 (1997).

⁹² LaNoe & Sullivan, *Presumptions*, *supra* note xxx.

through both countries? And finally if Syria is “Oriental,” how can its contiguous neighbor Lebanon be anything but Oriental.⁹³

Accordingly, the court held Ohio’s affirmative action statute unconstitutional, declaring it “repugnant to our constitutional system of government [to] exclude a group of United States citizens . . . [solely based on] the side of a river, a mountain range, or a desert their ancestor decided to settle.”⁹⁴

The court’s logic is superficially appealing, but it relies on the same logic of proximity that got the SBA into trouble. It is difficult to see where it would end. Regardless how you define it, race/ethnicity is not a geographically discrete phenomenon. “The [human] species is not divided into exclusive genetically distinct, homogenous groupings similar to subspecies, as the concept of “race” implies. All human groups share many features with other groups, and it is impossible to draw rigid boundaries around them.”⁹⁵

Arguably, both the Ohio court and the SBA were looking at the problem the wrong way. Affirmative action definitions should not hinge on global ethnography but rather should reflect the sociological meaning of race and ethnicity as phenomena *in the US*, as the SBA own stated criteria had proclaimed. If so, how are we to interpret this racial meaning, let alone identify it in particular cases? As we have seen, the SBA and other political actors have evaded the Who Question, propagating existing racial categories blindly and expanding their constituencies for reasons more of bureaucratic expediency than principle. As the next section illustrates, the Supreme Court has proven just as unwilling to undertake the challenge.

⁹³ *Ritchey Produce Co. v. State*, 1997 Ohio App. LEXIS 4590, *6 (Ohio Ct. App. 1997) (cited in LaNoue, *supra* note XX).

⁹⁴ *Ritchey Produce Co. v. State*, 707 N.E.2d. 871, 878 (Ohio Sup. Ct. 1997).

⁹⁵ *Houston Contractors*, 993 F. Supp. at 551; *see also* Haney López, *supra* [Social Construction of Race].

C. What the Supreme Court Hasn't Told Us

Preferential affirmative action began in an atmosphere of racial crisis with little unifying vision beyond the perceived need for action.⁹⁶ Over time, the original focus on remedying historical injustice expanded to embrace other objectives. Yet, while courts have said a lot about *why* we can do affirmative action (which rationales count as constitutionally compelling) and *how* we can do it (preferably not via quotas), they have said very little about *who* gets included.

The Who Question initially appeared uncontroversial because only one group was contemplated as the beneficiary of affirmative action: African-Americans. As Justice Marshall argued in *Bakke*, “[t]he experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that of a whole people marked as inferior by the law.”⁹⁷

However, while African-Americans remain the paradigmatic beneficiaries, an increasing share of the affirmative action pie has gone to other groups with less well-documented histories of societal prejudice.⁹⁸ Moreover, since almost every ethnic group has suffered at least *some* discrimination at some point, choosing between them is problematic.

Justice Powell saw this as an intractable challenge. The United States, he argued in *Bakke*, “ha[s] become a Nation of minorities,” in which even the so-called “ ‘majority’ is composed of various minority groups, most of whom can lay claim to a history of prior discrimination.”⁹⁹

⁹⁶ JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* (1996); GRAHAM, *supra* note xx, at 137-38.

⁹⁷ *Bakke*, 438 U.S. at 400 (Marshall, J., dissenting).

⁹⁸ *See supra* note xx.

⁹⁹ *Bakke*, 438 U.S. at 295.

He saw no principled basis to prioritize their competing claims to remedial justice. “The kind of variable sociological and political analysis necessary . . . simply does not lie within the judicial competence.”¹⁰⁰ Justice O’Connor in *Croson* similarly bemoaned the impossibility of selecting between “inherently unmeasurable claims of past wrongs.”¹⁰¹

Partly because of such difficulties, the Supreme Court has rejected societal discrimination as “too amorphous a basis for imposing a racially classified remedy.”¹⁰² The inability to trace causal links between injury and effects and to precisely calibrate a remedy raises the “danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.”¹⁰³ Fearful that societal justifications will thus be used to legitimize demands for outright racial balancing, the Court has held that only identified discrimination in a particularized context can serve to justify a racial remedy.¹⁰⁴

By reconceiving racism as discrete acts of prejudice in a limited context, the Court avoids having to grapple with the broader societal significance of race.¹⁰⁵ Furthermore, *Croson*’s prescribed means to identify such discrimination distances the Court even further. *Croson* held that cities could create an inference of unlawful discrimination by demonstrating a significant disparity between the availability of qualified minority-owned

¹⁰⁰ *Id.* at 297; see also *De Funis v. Odegaard*, 416 U.S. 312 (Douglas, J., dissenting) (noting the theoretical difficulties in evaluating competing claims of minority groups).

¹⁰¹ *Croson*, 488 U.S. at 506. Without a requirement of particularized evidence, Justice O’Connor feared that “our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate ‘a piece of the action’ for its members.” *Id.* at 510-511.

¹⁰² *Id.* at 497 (opinion of O’Connor, J.); *id.* at 506 (for the Court).

¹⁰³ *Id.* at 510 (opinion of O’Connor, J.). “In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.” *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 276 (1986).

¹⁰⁴ *Croson*, 488 U.S. at 505.

¹⁰⁵ *Cf. Gotanda*, *supra* note xx, at 43-44.

firms and the share of city contracts awarded to such firms.¹⁰⁶ The methodology of disparity testing supplants a messy sociological inquiry with the seemingly objective comfort of statistical analysis.¹⁰⁷ The Court no longer has to choose between groups because the numbers will do the job for it.

In *Bakke*, Justice Powell introduced a second rationale for affirmative action: promoting educational diversity.¹⁰⁸ Eschewing racial quotas, Powell insisted that consideration of race in this context be limited to “a plus factor” weighed in a holistic assessment of each individual applicant.¹⁰⁹ Focusing on individual applicants again moves away from the broader societal relevance of race. Moreover, by deferring on first amendment grounds to the right of universities to weigh the educational value of the viewpoints such applicants bring, the Court remains agnostic as to who would qualify under such a regime.¹¹⁰

In both cases, the Court’s solution focuses on underrepresentation. *Croson* established an intricate methodology to calculate such underrepresentation in contracting. Likewise, Justice Powell makes a point of distinguishing between Harvard’s flexible, individualized assessments (good) from U.C. Davis’ overly rigid, numerical quotas (bad).¹¹¹ Both thus go to some lengths to establish ground rules by which to count correctly.

¹⁰⁶ See *Croson*, 488 U.S. at 501-03, 509. *Croson* makes clear that disparities can only legitimize the use of racial preferences in extreme cases, as last resort. However, lower courts vary in the extent to which they demand race-neutral alternative be explored first.

¹⁰⁷ Statistical disparities are not the only evidence such studies evaluate. Anecdotal testimony about discrimination, history evidence, and social context may all be considered. However, statistical disparities represent the only “hard” evidence, and courts generally regard them as a *sine qua non*.

¹⁰⁸ Justice Powell’s opinion in *Bakke* received the imprimatur of the full Court in *Grutter*. 539 U.S. at 325.

¹⁰⁹ *Bakke*, 238 U.S. at 318.

¹¹⁰ See *id.* at 312-313; Richard Pildes & Richard Niemi, *Expressive Harms*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 498 (1993).

¹¹¹ *Grutter*, 539 U.S. at 335 (reiterating distinction in University of Michigan cases).

EEOC reporting requirements likewise force employers to pay attention to racial balance, many of whom voluntarily undertake affirmative action to increase minority representation.¹¹² Measuring group representation—or counting heads—has thus become our default way of answering the Who Question. Although the context and process by which such counting occurs vary, the numbers game is pervasive. To answer the Who Question, we have to count.

But *who* are we counting? Which minority groups do we look at? How do we define them? *Croson* doesn't tell us. It answers the selection question by reference to statistics, but ignores the definition question of which statistics to gather. Similarly, *Bakke* accepts race as a proxy for viewpoint yet leaves open how underrepresented “racial” views are to be identified. *Bakke* and *Croson* thus both offer frameworks to select affirmative action beneficiaries by race while ignoring the definitional question of what race actually is.¹¹³

Despite a vast body of case law on discrimination, there is surprisingly little law defining “race.” One leading case, *St. Francis College v. Al-Khazraji*, defined “race” as an “identifiable class[] of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”¹¹⁴ Yet, America is full of ethnic and

¹¹² See Deborah Malamud, *Affirmative Action and Ethnic Niches*, in Skrenty, *COLOR LINES*, *supra* note xx at 318 (explaining how employers have incentive to maintain racial parity to preempt discrimination claims).

¹¹³ This ambiguity proved controversial when the SBA excluded Hasidic Jews from federal affirmative action on the ground that the Hasids were a religious group and not an ethnicity. See LaNoue & Sullivan, *supra* note xxx, at 449.

¹¹⁴ *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (interpreting race in context of section 1981). See also *Bennun v. Rutgers State Univ.*, 941 F.2d at 154, 173 (3rd Cir. 1991) (describing racial discrimination as based on stereotypes regarding identifiable groups with shared physical or cultural traits ascribed to a common ancestry).

national origin groups that meet this definition.¹¹⁵ It would be impractical to count them all, but how do we choose between them?¹¹⁶

D. Beyond Consensus: An Empirical Assessment of the Quadrangle

For some, the answer to this unanswered question will seem obvious. We all have an intuitive idea who the “minorities” in this country are. The ethno-racial quadrangle is embedded in our national consciousness.¹¹⁷ Courts have explicitly defended such a “popular consensus” approach to the Who Question, arguing that race is best understood as “a matter of practice or attitude in the community.”¹¹⁸ Choosing affirmative action categories that reflect such conventions also accords with a long line of Supreme Court cases that have defined race according to a “popular belief” standard.¹¹⁹

However, to say that the categories used in affirmative action “reflect” a popular consensus may be to get the causality reversed. As we saw, the federal government’s establishment of formal categories for race itself helped to manufacture the current consensus on race. Over time, the ubiquity of such standard groupings may have reinforced this popular consensus, as has active campaigning by identity group lobbies.¹²⁰

¹¹⁵ The US Bureau of Census counts at least 630 established ethnic groups. Students in New York City School District 23 alone converse in some 83 different languages. See LaNoe, *Presumptions & Sullivan*, *supra* note xxx, at 439.

¹¹⁶ We might limit our counting only to “minorities.” But who exactly are they? To answer “non-Whites” only begs the question: Who is White? Furthermore, unless we lump all “minorities” together, we would still have to have some way of defining boundaries between them.

¹¹⁷ Hollinger, *supra* note xx, at 33.

¹¹⁸ *Peightal*, 26 F.3d at 1561 n.25.

¹¹⁹ IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (re: naturalization cases); *St. Francis*, 481 U.S. at 610 (defining race based on popular understanding when Section 1981 was enacted).

¹²⁰ See GRAHAM, *supra* note xx, at 144.

Nonetheless, the question remains whether this consensus is backed by underlying reality.

Commentators have expressed skepticism. George La Noue suggests “these categories are merely bureaucratic conveniences around which political constituencies have been constructed.”¹²¹ The comparative scholars behind the *amicus* brief referenced above similarly dismiss the quadrangle as “based on a mixture of inadequately examined folk categories and interest group politics.”¹²²

Empirical information is hard to come by. Most studies of race work within the standardized categories and fail to account for *intra*-group differences. Yet, the US Census does collect some data on racial subgroups. Such evidence reveals considerable variation within the broad categories of the quadrangle. Across a wide array of socio-economic indicators, the differences *within* the main racial groups appear as great as those *between* them.

Such internal variance is particularly striking within the Asian and Hispanic categories. Across the board, the “top performers” score well above the US average, while those at the bottom measure well below the US mainstream. For example, Asian Indian-, Chinese-, and Japanese-Americans earn almost bachelors degrees at almost double the US average, and their success at the graduate level is even more extreme—almost quadruple the US average for Indian-Americans.¹²³ Twice as many Indian-Americans occupy managerial or professional positions as the US norm, with Chinese and Japanese also well above the norm. These groups’ homes are valued at double the US median. By contrast, Cambodian-, Laotian-,

¹²¹ LaNoue & Sullivan, *Deconstructing*, *supra* note xxx at 917.

¹²² *Amicus* scholars, *supra* note xxx at 879.

¹²³ See Table II for Asian census data. For a comparable analysis of Hispanic subgroups, see *infra* notes xxx and Table III.

Samoan-, and Tongan-Americans show statistics that present almost the reciprocal image of their East and South Asian compatriots.¹²⁴ Cambodian-Americans garner half as many BAs and a quarter the number of graduate degrees as the US average, their representation among the professional class is also half the US rate, and their poverty rate more than double. Laotians, Samoans and Tongans fare only slightly better.

Table II - Socioeconomic Breakdown of Asian Pacific Subgroups

Population Group	<u>Education</u>		<u>Occupation</u>	<u>Property</u>	<u>Income</u>
	% earning degree		Managerial or	Median Home	% below
	Bachelors	Graduate	Professional	Value	Poverty Level
ALL US	15.5%	8.8%	33.6%	\$119,600	12.4%
ASIANS	26.7%	17.3%	44.6%	\$199,300	12.6%
Asian Indian	29.6%	34.3%	59.9%	\$210,200	9.8%
Japanese	28.7%	13.1%	50.6%	\$238,300	9.7%
Chinese	24.1%	23.8%	52.2%	\$232,200	13.5%
Koreans	29.1%	14.6%	38.7%	\$209,500	14.8%
Vietnamese	14.5%	4.8%	26.9%	\$151,400	16.0%
Samoan*	7.5%	3.0%	18.6%	\$153,200	20.2%
Tongan*	7.3%	1.3%	13.3%	\$149,100	19.5%
Laotians	6.3%	1.4%	13.3%	\$100,500	18.5%
Cambodian	6.9%	2.2%	17.8%	\$120,800	29.3%
BLACKS	9.5%	4.8%	25.2%	\$80,600	24.9%

*Not included in Asian totals

Source: 2000 U.S. Census

Such intra-group differences call into question the statistical inferences of discrimination on which *Croson* is premised, by potentially skewing the data used in disparity analyses. For example, consider the variation in business formation rates among Asian-Americans (a key variable in disparity analyses): Koreans have the highest business formation rate of any ethnic group, while Laotians have the lowest.¹²⁵ If you're doing a disparity study that lumps these groups together, the conclusions you reach based on numbers alone may not tell you much.

¹²⁴ In terms of socio-economic disadvantage, Southeast Asians and Pacific Islanders thus stand much closer to African-Americans than to the "model minority" stereotype associated with the Asian group overall.

¹²⁵ See LaNoue & Sullivan, *Deconstructing*, *supra* note xxx at 913.

The federal district court reviewing Denver’s municipal contracting program specifically cited disparate rates of business formation among included groups as undermining the city’s statistical conclusions.¹²⁶ The Houston district court similarly condemned the “use of aggregate statistics [that fail to] show the variation within the groups.”¹²⁷

Disparities due to immigration further undermine the methodological assumptions of *Croson*. Asian, Hispanic, and increasingly even Black communities often include large numbers of recent immigrants whose relative underrepresentation often reflects causal factors specific to immigration—unfamiliarity with US customs, lack of social capital, linguistic hurdles, etc.—things that have nothing to do with race and can be expected to disappear with the passage of time. Yet, disparity studies rarely attempt to correct for such immigration effects.¹²⁸

Such internal heterogeneity raises the danger that nondisadvantaged subgroups may ride the coattails of their less fortunate group members. The problem is not just that a few jobs or contracts may go to a group that doesn’t deserve them. *Less*-disadvantaged groups often end up usurping a disproportionate share.¹²⁹ This phenomenon also applies *across* minority groups and may account for the declining share of affirmative action benefits going to African-Americans who must now compete with more socio-economically successful minorities

The risks cut both ways. Not only can undeserving subgroups piggyback on the underrepresented status of a larger group, but genuinely disadvantaged subgroups might be unfairly excluded if the larger, umbrella

¹²⁶ *Concrete Works*, 86 F. Supp. 2d at 1070.

¹²⁷ *Houston Contractors*, 993 F. Supp. at 554.

¹²⁸ *Adarand Constructors, Inc. v. Slater*, 228 F.3d at 1164 (burden of proof on plaintiff to rebut government’s prima facie case).

¹²⁹ Malamud, *supra* note xx, at 321 (“when all members of minority groups are equally eligible for affirmative action, the best-off among them will prevail”).

group they belong to is too successful. One sees this in higher education, where Asians are often overrepresented and no longer counted for diversity purposes. Yet, several Asian Pacific subgroups remain heavily *underrepresented*.¹³⁰ Samoan and Laotian students thus suffer from being lumped together with more successful East and South Asians. These groups look nothing alike and come from vastly different backgrounds. Yet, we assume they share a common experience based on their “Asian” identity that makes them fungible equivalents.¹³¹

Moreover, some arguably disadvantaged minority groups lie outside the quadrangle entirely. A recent study of employment discrimination in California looked at discrimination against job applicants with ethnically identifiable names.¹³² The study revealed greater bias against applicants with identifiably Arab names than those of any other ethnic group—hardly surprising after 9-11. Yet, most affirmative action programs count Arab-Americans as White, which means they *don’t* get counted.

Therefore, one might question whether the wisdom of relying on ethno-racial quadrangle as the basis for government policy. Although we may superficially locate “race” within its coordinates, the quadrangle’s explanatory power seems empirically questionable. In the black box of a disparity study, garbage in means garbage out.

E. From Empiricism to Constitutionalism: A Well-Tailored Quadrangle?

Some might argue that such internal differences are inevitable and beside the point. Race is not a logical construct but a projection of societal

¹³⁰ Brief *Amicus Curiae*, *supra* note xx.

¹³¹ Cf. *Metro. Broadcasting, Inc. v. FCC*, 497 U.S. 547, 615 (1990) (O’Connor, J.) (criticizing assumption that there is a single “minority” viewpoint).

¹³² *Names Make a Difference: The Screening of Resumes by Temporary Employment Agencies in California*, Report by the Discrimination Research Center (Oct. 2004), on file with the author.

perceptions and stereotypes. Accordingly, courts have defended the popular consensus approach (and by extension, the quadrangle) on the grounds that it captures the sort of intangible, inter-subjective phenomena that are most salient to affirmative action.¹³³

Such arguments would seem to have little merit under the diversity rationale presented by Justice Powell in *Bakke*. Achieving diversity within groups would seem just as important that as between them. As a proxy for viewpoint, the broad quadrangular categories are simply too blunt.¹³⁴ Moreover, rather than conforming to existing stereotypes, the goal should be to challenge them. Emphasizing variation *within* group identities encourages students to look beyond them.

Therefore, this section will focus on remedial affirmative action, a context in which using categories that conform to the contours of societal prejudice makes more sense. Arguably, the quadrangular categories “serve well as predictors of the dynamics of mistreatment, and thus as a foundation for initiatives designed to protect people against such mistreatment or to compensate them for it.”¹³⁵ The Tenth Circuit similarly justifies use of the quadrangle based on “the harsh fact that racial discrimination commonly occurs along lines of the broad categories.”¹³⁶

These arguments justify the quadrangle on *functional* grounds, i.e. they rest on assumptions about how racial bias functions in society.¹³⁷ The

¹³³ See, e.g. *Peightal*, 26 F.3d at 1561 n.25.

¹³⁴ *Hopwood*, 78 F.3d at 946-47; McGowan, *supra* note xx, at 135 (“categorization by race or ethnicity fails to capture the complexity of social experience of many groups As a result, real diversity may suffer”); see also *id.* at 136 (use of race under guise of diversity may be motivated by covert remedial goals).

¹³⁵ Hollinger, *supra* note xx, at 33.

¹³⁶ *Adarand Constructors, Inc. v. Slater*, 228 F.3d at 1176, 1185 (holding that there was no need for further inquiries at the level of subgroups). Other courts have similarly refused to look behind the standard quadrangular categories. See *Peightal*, 26 F.3d 1545; *Rothe Dev. Corp. v. United States Dep’t of Def.*, 324 F. Supp. 2d 840 (W.D. Tex. 2004), *Dynalantic Corp. v. United States Dep’t of Def.*, 937 F. Supp. 1 (D.C. Dist. 1996).

¹³⁷ Such a functional approach was demonstrated by the Supreme Court in *Hernandez*

idea is that if Mexicans, Puerto Ricans, and Cubans all encounter a particular kind of racial prejudice (whereas, e.g., Chinese do not), one can say that the former are discriminated against “as Hispanics.”¹³⁸ The category “Hispanic” is defined by the contours of anti-Hispanic bias.

On one level, this is just the basic law of remedies: defining the remedial class based on the scope of the injury. “To define an Indian or a Black to determine who should be counted . . . [you] look at the actual discrimination being rectified and treat as Blacks or Indians the same kind of people that the defendants had treated as Blacks or Indians.”¹³⁹ The problem with voluntary affirmative action, however, is there *is* no identified tortfeasor to base such decisions on, nor likely any direct evidence of discrimination. In a typical *Croson* disparity study, the “discrimination” is inferred through statistical analysis. Its scope can be measured only in terms of statistical aggregates. Moreover, the procedural order is inverted: Instead of the injury determining the remedial categories, here, racial categories must be established in order to demonstrate the *existence* of the injury through statistical disparities measured *with respect to* such categories. Therefore, unlike a typical tort remedy, the definition question must be answered prior to the “selection question.” Different definitions will encompass different data sets, but there may be several variant definitions which could each give rise to a valid finding of statistical

v. Texax where the Court *contrasted* the popular view of Mexican-Americans as racially White, with the systematic prejudice that marked them as something “other,” the functional equivalent of a separate race. 347 U.S. 475 (1954). In this case, Hollinger and 10th Circuit seek to *assimilate* such a functional view of race into the popular one.

¹³⁸ *Cf. Adarand*, 228 F.3d at 1176 n.18 (Asian-Americans discriminated against *because* they were Asian-Americans); *Al-Khazraji*, 481 U.S. at 613 (defining race as an identifiable group subjected to discrimination based on shared traits).

¹³⁹ *See Montana Contractors' Ass'n. v. Sec'y of Commerce*, 460 F. Supp. 1174, 1176 (D. Mont. 1978) (“In those cases the discriminating actor defines the race as to which relief should be granted by his act of discrimination, and when the remedy is fashioned, it necessarily is tailored to correct the actual injustice done.”); *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3d Cir. 1991).

underrepresentation. Such definitional choices matter because they define the scope of *prima facie* “discrimination” and hence the presumptive contours of any remedy.

Rocco Luiere’s case illustrates this problem in that the composition of the Hispanic data set was actually litigated.¹⁴⁰ Since Iberians make up only 2% of the Hispanic population of New York State, the state’s finding that Hispanics were underrepresented in public contracting would likely have been made regardless of whether Iberians were counted in its disparity study. Yet, because the category used to count with dictates the presumptive contours around which the remedy will be fashioned, the choice of definition going in determined whether Iberians had a *prima facie* claim to share in the remedy.¹⁴¹ Rather than the “injury” defining the remedy, in practice, New York’s choice of definition defines the “injury.” The definition question thus predetermines New York’s answer to the “selection question.”

Definitional fiat also dictated the outcome of Lebanese contractor Nadim Ritchey’s case in Ohio. In rejecting his challenge to Ohio’s “Oriental” category, the Ohio Supreme Court held that “persons of Lebanese ancestry have [not been shown to have] suffered disadvantage and discrimination in the area of state contracting opportunities to the same degree and to the same extent [as] the minority groups listed in [Ohio’s statute].”¹⁴² In reality, the only discrimination shown against “Orientals” was inferred from statistical disparities affecting *all* “minorities” (i.e. those Ohio’s legislature chose to recognize as such).¹⁴³ Moreover, Ohio defined

¹⁴⁰ See *Jana-Rock*, Memorandum-Decision.

¹⁴¹ The choice of category thus controls both inputs and outputs. See *Ritchey*, 707 N.E.2d 871 (arguing to do otherwise would run the risk of overinclusiveness, by including beneficiaries not shown to have suffered the injury).

¹⁴² *Ritchey*, 707 N.E.2d at 922.

¹⁴³ See *id.* at 736-37 (criticizing the statistical evidence on which the Ohio legislature had relied on for lumping all minority groups together in undifferentiated analysis).

its remedial class to include subgroups who may not even *have existed* among Ohio contractors at the time the findings of disparities were compiled.¹⁴⁴ Had Lebanese been thrown into this mix, presumably they too would now be cloaked in the same presumptive entitlement.

To bestow on the groups who *were* included a collective blessing denied to Lebanese assumes that Ohio had a logical basis for testing only the former—an assumption which the Ohio Supreme Court leaves unexamined. Conversely, the Tenth Circuit upheld the inclusion of Bhutanese and Samoans in federal set-asides because it assumed that “as Asians” they were subject to the discrimination against “Asians” that Congress had statistically identified, without questioning the underlying definition of “Asian-ness” being relied on.¹⁴⁵

The problem with these cases is that they ignore the crucial advantages conferred by inclusion among the “official” minorities of the quadrangle. Once relegated to the status of outsiders, Rocco Luiere and Nadim Ritchey faced uphill battles, saddled with the burden of proof to overcome their definitional exclusion.¹⁴⁶ By contrast, groups such as Bhutanese-Americans benefit from their status as definitional insiders on several levels. First, such tiny subgroups are likely too small to generate statistically significant evidence of disparities and may not have even been present at the relevant time. Being included in the quadrangle overcomes such logistical obstacles and enables these newer subgroups to piggyback

¹⁴⁴ *Assoc. Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (noting pointedly that “contractors of, let us say, Thai origin . . . might never have been seen in Ohio until recently,” yet would receive a preference). Others appear to have been *retroactively* written into the category definitions.

¹⁴⁵ *Adarand*, 228 F.3d at 1176 & n.18.

¹⁴⁶ *Ritchey Produce*, 707 N.E.2d at 922; *Jana-Rock*, 2006 U.S. App. Lexis 4050 at *41; *see also Peightal*, 26 F.3d at 1561. All these cases effectively put the burden of proof on the *plaintiff* to challenge the category. Narrow tailoring, however, normally places the burden on the *government* to defend its classifications. *See Johnson v. California*, 543 U.S. 499, 505 (2005).

on a documented history of bias against their ostensible ethnic kin. Second, the fact that Asian, Hispanic, and increasingly even Black communities typically include large numbers of recent immigrants confers a built-in advantage in disparity analyses, given the likelihood that recent immigrants will be inherently underrepresented.

As a result, who gets counted where matters more than one might initially think. In many cases, the answer to the selection question is predetermined by the “definition question.” Yet, as we have seen, the definitions we have emerged in a fairly arbitrary process. Categories concocted without much thought were politically manipulated and expanded through dubious exercises in armchair ethnography, then blindly replicated and defended by entrenched interest groups. Moreover, such boundary lines continue to be manipulated. South Asians, for example, were retroactively added to Ohio’s “Oriental” category by an executive order of the governor, which critics linked to campaign contributions from Indian donors. Portuguese joined California’s Hispanic category under similar circumstances.¹⁴⁷

Such political manipulations underscore the Houston court’s dictum that “race is politics.” It is one thing to argue that race is inherently subjective and that arbitrary divisions are inevitable. However, if the *process* by which definitional lines were drawn is itself suspect, it becomes more difficult to justify according them a presumptive validity. From the standpoint of a Rocco Luiere or Nadim Ritchey, the playing field hardly seems level.¹⁴⁸ Furthermore, to the extent such arbitrary definitions result

¹⁴⁷ Inspector General of Ohio, Report of Investigation, Case No. 93-39 *available at* <http://watchdog.ohio.gov/investigations%5Coiggov.htm#pri>.

¹⁴⁸ One could argue that the “consensus” around the quadrangle merely obscures an original injustice. This begs the question as to an appropriate remedy. If the popular consensus is now a *fait-accompli*, is it too late to go back? Trademark law offers some precedent for forced efforts to reverse popular attitudes. *Cf.* Big O Tire Dealers, Inc. v. Goodyear Tire and Rubber, Inc., 561 F.2d 1365 (10th Cir. 1977). Admittedly, the weight

in the inclusion of otherwise undeserving subgroups (or omission of others that *are* deserving), this raises the danger of over- or underinclusiveness in the remedy. This turns an empirical debate into a constitutional question: Must affirmative action definitions be narrowly tailored to serve the goals of affirmative action in order for the remedy to comply with strict scrutiny?

Enforcing such narrow tailoring of categories would help to align the definition question with the selection question in that the same normative concerns would apply to both. When it comes to analyzing such “category tailoring” issues, however, courts have been all over the page. Most simply ignore the issue. Others have invoked obstacles of standing,¹⁴⁹ manipulated burdens of proof,¹⁵⁰ limited their assessment to the facts “as applied,”¹⁵¹ or demanded evidence of bad intent.¹⁵² Courts have also struggled to locate this kind of equal protection challenge within existing doctrine. Such definitional questions could be cognized in two different ways: either (1) as a facial challenge to the definition *qua* racial classification or (2) as a narrow tailoring challenge to the remedy that follows from it.¹⁵³ Courts have followed both approaches, sometimes in the same opinion.¹⁵⁴ They have also differed as to the level of scrutiny they apply.¹⁵⁵

of momentum to be overcome in this context is far greater.

¹⁴⁹ *Peightal*, 940 F.2d at 1409 n.39 (questioning plaintiff’s standing as white male to object to Hispanic definition).

¹⁵⁰ *Peightal*, 26 F.3d 1545; *Ritchey Produce*, 707 N.E.2d 871 (Ohio Sup. Ct.).

¹⁵¹ *Peightal*, 26 F.3d 1545; *Jana-Rock Construction, Inc. v. New York State Dep’t of Econ. Dev.*, 5:04-CV-635, Memorandum-Decision and Order, Oct. 28, 2004 (N.D.N.Y.).

¹⁵² *Jana-Rock*, 2006 U.S. App. Lexis 4050.

¹⁵³ Compare *Jana-Rock* Memorandum-Decision (facial classification approach), with *Peightal*, 26 F.3d 1545 (narrow tailoring analysis).

¹⁵⁴ Cf. *Jana-Rock*, 2006 U.S. App. Lexis 4050.

¹⁵⁵ Compare *Jana-Rock*, 2006 U.S. App. Lexis 4050; *Builders Ass’n*, 256 F.3d at 647, with *Ritchey* trial court. In Rocco Luiere’s case, the district court fundamentally misconceived the doctrinal requirements in this regard. Cf. *Jana-Rock* Memorandum-Decision (opting for rational basis on dubious ground that “a person of Spanish descent does *not* qualify as a member of a suspect class either on the basis of race or national origin”).

Many courts simply assume that disparity testing itself “validates” the choice of racial categories by identifying discrimination against the population they encompass,¹⁵⁶ reducing definitional uncertainties to a statutory interpretation issue, “more a question of nomenclature than of narrow tailoring.”¹⁵⁷ Yet, it seems circular to argue that findings of statistical disparities validate the choice of initial categories because, as we have seen, such definitions can be manipulated without altering the statistical conclusion. Since the discrimination is merely inferred statistically, its accuracy depends partly on the assumptions that shape its inputs.

Therefore, even if Hollinger and the 10th Circuit are correct to suggest that patterns of prejudice broadly track the popular consensus on race, this still does not mean that each and every included subgroup in these broad racial categories experiences “race” the same way. Given the haphazard way in which such categories were created, the risk of outliers cannot be dismissed. If the quadrangle only imperfectly tracks the criteria relevant to the purposes of affirmative action, such an imperfect “fit” would still raise narrow tailoring issues.¹⁵⁸ Blind deference to existing definitions therefore seems unfounded. Since the choice of categories helps determine who is preferred (and who is excluded) on the basis of race, courts should arguably require some justification for drawing such lines that goes beyond the reflexive rubberstamping of federal definitions.¹⁵⁹

¹⁵⁶ Cf. *Ritchey Produce*, 707 N.E.2d at 893-95 (arguing that disparity testing defines the limits of narrow tailoring).

¹⁵⁷ *Adarand*, 228 F.3d at 1185. Thus, the Ohio Supreme Court determines category boundaries according to their dictionary meaning. See *Ritchey Produce*, 707 N.E.2d at 927 (construing “the common, ordinary, and everyday meaning of the term ‘Oriental’”).

¹⁵⁸ See *Croson*, 488 U.S. at 493 (“deviations from equality require utmost precision”).

¹⁵⁹ See *Jana-Rock*, 2006 U.S. App. Lexis 4050 at *31-32 (arguing New York needed to tailor its categories to its own context).

This Article has suggested a “categorical tailoring” approach that would align the definition question with the “selection” question leaving both to be answered in a manner narrow tailored to serve the normative goals of affirmative action. Such an approach would draw inspiration from *Croson* itself. Although the bulk of the *Croson* decision ignores the “definition question,” it did offer some cryptic hints regarding “categorical tailoring” requirements.

In *Croson*, the Court was primarily concerned with the evidentiary showing of particularized discrimination needed to legitimate racial preferences. The Court rejected Richmond’s evidence of discrimination against minority-owned businesses in the local construction industry as falling short of the statistical standards the Court required.¹⁶⁰ However, what make *Croson* unique from the standpoint of the Who Question is that the opinion went beyond this generalized majority-minority paradigm to distinguish *between* minority groups. Writing for the Court, Justice O’Connor noted that the Richmond had made a colorable case for inclusion of only one group, African-Americans. By contrast, no evidence whatsoever had been offered to show discrimination in the local construction industry against any of the *other* minority groups that Richmond had made eligible for preferences, including “Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons.”¹⁶¹ Justice O’Connor commented archly that “[i]t may well be that Richmond has never had an Aleut or Eskimo citizen.” She observed that the “random inclusion of [such] groups” belied Richmond’s remedial intent.¹⁶²

This brief venture by the Court into the uncharted terrain of the Who Question reads like an aside, occupying two paragraphs in a otherwise

¹⁶⁰ *Croson*, 488 U.S. at 499-502.

¹⁶¹ *See id.* at 506.

¹⁶² *Id.*

lengthy opinion. So it may be unwise to overread its significance. Perhaps Justice O'Connor only meant to stress the absurdity of including such "random" groups as Aleuts. However, O'Connor also questioned the inclusion of *other* minority groups who *were* represented in Richmond's construction industry (albeit in small numbers). Moreover, much of the evidence Richmond had offered—including its statistical analysis—pertained to minority contractors as a whole without differentiating by race. Nonetheless, *Croson* drew a clear distinction between the undeniable (albeit inadequate) evidence of bias against Blacks and the complete lack of evidence of bias against any *other* group. By parsing this evidence to distinguish Blacks from other minorities, *Croson* seemed to suggest that Richmond needed to have done its disparity testing on a more targeted basis.

What to make of this? *Croson*'s disparity testing methodology was modeled on the Court's Title VII case law in which lumping minorities together for statistical purposes had not hitherto been seen as objectionable.¹⁶³ What may have been different here was specific evidence of historical discrimination in the record pertaining exclusively to African-Americans (who also constituted the overwhelming majority of minorities in Richmond). Therefore, the Court may have seen Blacks as a special case in that context, demanding individualized analysis.¹⁶⁴

¹⁶³ See *New York Transit Authority v. Beazer*, 440 U.S. 568, 568 (1979) (Hispanic and Black employees counted together in assessment of disparate impact of methadone ban); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 642 (1989) (all "minorities" pooled in statistical disparity assessment); *Croson*, 488 U.S. at 501 (citing *Hazelwood School Dist. v. United States* 433 U.S. 299, 307-308 (1977)).

¹⁶⁴ Similarly, in *Montana Contractors*, the court rejected the inclusion of other minority groups when the evidence in the record really focused on Native Americans. 460 F. Supp. 1174 (D. Mont. 1978).

In practice, the almost universal approach has been to assess underrepresentation based on the standard quadrangular categories.¹⁶⁵ Yet, given the diversity of contexts in which affirmative action operates, the ubiquity of the quadrangle arguably bespeaks a “one-size-fits-all” approach that runs contrary to the dictates of narrow tailoring. Several courts have taken a dim view of affirmative action plans that adopt such a “laundry list” approach to category-making, drawing analogies to *Croson*’s “random inclusion” of Aleuts.¹⁶⁶

Croson strongly implies that the mere fact that Richmond defined a data set that may have “included” Aleuts in a definitional sense would not justify their inclusion in the ensuing remedy if there were no Aleuts actually present.¹⁶⁷ *Croson* also makes it clear that the subsequent arrival of an Aleut contingent would do nothing to alter this analysis, since African-American contractors who “actually suffered” discrimination should not be obliged to share their remedy with such Johnny-come-latelies.¹⁶⁸

Following *Croson*’s lead, lower courts have duly incorporated a “random inclusiveness” prong as part of their narrow tailoring review. Thus, a Sixth Circuit panel found Ohio’s definition of “Oriental”

¹⁶⁵ See George LaNoue, *To the 'Disadvantaged' Go the Spoils?*, PUBLIC INTEREST Winter 2000, at 91. Where statistical evidence of disparities for particular groups has proven lacking, courts have held such groups ineligible. See, e.g. *Contractors Assoc. of E. Penn., Inc. v. Philadelphia*, 6 F.3d 990 (3d. Cir. 1993) (non-black minority groups enjoined from inclusion within municipal affirmative action program).

¹⁶⁶ *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001). See also *Houston Contractors Ass’n v. Metro. Transit Auth. of Harris County*, 993 F. Supp. 545, 555 (S.D. Tex. 1997) (criticizing Texas for “cop[ying] whatever the federal government required to get federal funds without a determination of the categories or the applicability to Texas’s experience.”); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997) (speculating that “those who drafted the statute for the legislature copied from a model form and neglected to strike its inapplicable portions”).

¹⁶⁷ To do this, Richmond would not have to count any actual Aleuts in compiling its minority data. All it would do was define a data set of “all minorities” that theoretically embraced any Aleuts who *might* have happened to be there. Assuming disparities were established for that data set, the same “all minority” category would then constitute the remedial class which, by definition, included Aleuts.

¹⁶⁸ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506, 508 (1989).

overinclusive, in part, because it included groups “who might never have been seen in Ohio until recently” such as Thai-Americans.¹⁶⁹ Drawing an analogy to Richmond’s Aleuts, the court argued that including Thais in a beneficiary category would violate narrow tailoring.¹⁷⁰ San Francisco chose to omit Dominicans from its Hispanic definition on similar grounds.¹⁷¹

The problem with this sort of categorical tailoring analysis is that it has no logical stopping point: If narrow tailoring requires attention to subgroups, how small does one have to go?¹⁷² Almost any group definition will include an identifiable subset of people who were/are not actually present at some relevant time.¹⁷³ Pushed to the limit, categorical tailoring of this form would require individualized analysis to a degree that would preclude group remedies based on race.¹⁷⁴

To avoid such difficulties, we should return to the Tenth Circuit’s functional test which defines the “relevant group” according to the context

¹⁶⁹ In *Croson*, Aleuts had been explicitly identified as a racial category on their own, whereas Thais were merely a subgroup within Ohio’s Oriental category. It is unclear, however, why this fact should be dispositive. Would the Court have less perturbed had Richmond defined a category of “Native Americans” that included Aleuts? In fact, Richmond did have a separate category of “Indians,” although presumably not every single federally recognized tribe was represented among Richmond’s population of contractors.

¹⁷⁰ See *id.* at 737; see also *Monterrey Mechanical*, 125 F.3d at 714 (same problem with Aleuts in California).

¹⁷¹ Interview with Mara Rosales, Office of City Attorney, San Francisco, February 2, 1998 (explaining that the Dominicans had not been represented in the relevant population of contractors).

¹⁷² The Sixth Circuit distinguished Thai from Chinese. But there are many different ethnic/linguistic subgroups among Chinese. Does it matter whether the Chinese were Cantonese vs. Hakka? Race and ethnicity can be disaggregated endlessly down to individual villages and extended families. But at some point, such distinctions no longer seem relevant from the standpoint of US policy.

¹⁷³ “Presence” also is a murky concept—if a single Aleut had wandered through Richmond fifty years ago and suffered discrimination, would this suffice? If not, how many and how recent? Would they have to have been actual contractors who were “ready and able” to bid? or just potential contractors?

¹⁷⁴ In theory, such individualized analysis is already required under the constitutional standards governing consideration of race in university admissions, although the use of broad racial categories to assess diversity undercuts this claim to individuation. *Croson* also gestures toward individualized appraisals by requiring “opt out” provisions and procedures to challenge individual eligibility. *Croson*, 488 U.S. at 508.

in which such group identities function. If Ohio bigots are functionally incapable of distinguishing between Thais and other Asians subgroups, then Ohio can justify defining race broadly. Arguably, it should not matter that the only victims of historical discrimination happened to have been Chinese. So long as “Asian-American individuals [were] subject to discrimination *because of* their status as *Asian-Americans*” there is no need to distinguish between them by subgroup, since in functional terms Thais constitute the *racial equivalent* of Chinese.¹⁷⁵

Adopting such an external perspective on race pushes us back toward a “popular consensus” view.¹⁷⁶ We can assume that beyond national origin, finer distinctions regarding group identity are likely irrelevant. Yet, a popular view of race is not necessarily synonymous with a functional reading. One sees a divergence between popular vs. functional conceptions of race, for example, with Black immigrant groups in New York. Although most people would unquestionably identify Nigerians and Jamaicans as racially “Black,” these groups don’t seem to attract the same degree of racial prejudice as African-Americans.¹⁷⁷ At least in the job market, employers have either learned to look beyond color and differentiate by

¹⁷⁵ Adarand, 228 F.3d at 1176 n.18 (emphasis added). Arguably, equating Thais with Chinese here is no different than counting both Fujienese and Hunanese as Chinese when only the former had a historical presence.

¹⁷⁶ The results of an external approach to “functional race” will not always be coterminous with the popular consensus. Ohio bigots might learn to distinguish Thais from Chinese and discriminate more discriminately even though continuing to regard both groups as “Asian.” Similarly, one might conclude that Chinese and Thai students bring different sorts of diversity to the classroom, even if their fellow students initially fail to distinguish between them.

¹⁷⁷ See Lee, *supra* note xx, at 184. The likely explanations are complex and cultural: West Indian and African immigrants appear less burdened by pernicious stereotypes than domestic Blacks. They never experienced the psychic wounds inflicted by slavery and Jim Crow. They also tend to have stronger family support structures and more positive role models.

subgroup, or are otherwise responsive to cultural nuances that permit such immigrants to evade the full brunt of racial prejudice.¹⁷⁸

Therefore, the quadrangle is still subject to scrutiny on a functional basis, as the Seventh Circuit demonstrated: That court rejected Cook County's Hispanic category because it included Spanish and Portuguese-Americans, "groups . . . that common sense (not contradicted by any evidence) instructs have never been subject to significant discrimination by Cook County."¹⁷⁹ Even though Iberians arguably fell within the popular meaning of "Hispanic," they failed Judge Posner's *functional* test of racial meaning because they were not subject to the kind of anti-Hispanic prejudice that the remedy was intended to target. Because the remedial category did not "fit" the purpose of the remedy, it violated narrow tailoring.¹⁸⁰ This sort of "categorical tailoring" analysis has also been applied to *underinclusive* categories, i.e. those which omit subgroups similar to the ones included.¹⁸¹

Croson also strongly emphasized the importance of the local evidentiary context. In holding that only "particularized findings" of discrimination could justify race-conscious remedies, the Court rejected Congressional findings of discrimination in construction contracting

¹⁷⁸ The stereotype of Jamaicans as having a strong work ethic—as portrayed in such mainstream television shows as "In Living Color" (where the Jamaican characters were all portrayed as working multiple jobs)—may have convinced some that Jamaicans were the "good" kind of Black. Others may simply like their exotic accents.

¹⁷⁹ *Builders Ass'n*, 256 F.3d at 647.

¹⁸⁰ Note that it did not matter whether Chicago could demonstrate a statistical disparity based on a Hispanic data set that happened to include Iberians. Posner found the category itself so inherently implausible that by defining "Hispanic" in this over-inclusive manner, the category was void *ab initio*. Just as *Croson* objected to Richmond's lumping Blacks together with other minority groups not subject to the same discriminatory history, the racial experience of Iberians was deemed too "unlike" other Hispanics to treat them the same.

¹⁸¹ Ohio's inclusion of South Asians, but not Lebanese in its "Oriental" category was deemed underinclusive for this reason. *Ritchey Produce*, 1997 Ohio App. LEXIS 4590 at *6. See also *Hopwood*, 78 F.3d at 948 n.37 (questioning of preferences to Mexican-Americans, but not other Hispanics under a diversity rationale).

nationwide as insufficient to support preferences in the municipal context.¹⁸² Instead, to survive strict scrutiny, Richmond had to identify discrimination locally in the specific sector for which it proposed a remedy. Similarly, the Court's objection to Richmond's lumping Blacks with other "minorities" seemed to turn on the specific local history of anti-Black bias. Accordingly, one might infer that categorical tailoring should be informed by attention to the local context as well.

The Second Circuit followed this rationale when it argued that New York State needed to "mak[e] an independent assessment of discrimination against Hispanics of Spanish origin *in New York*."¹⁸³ Other courts have echoed this view.¹⁸⁴ As one court observed, "the needs of the Japanese in Hawaii are [not] the same as those of the Japanese in California . . . the needs of [American] Indians in New York are [not] the same as those of the Indians in Montana."¹⁸⁵ Texas' restriction of affirmative action to groups most subject to historical discrimination in Texas similarly met the Fifth Circuit's approval as evidence of narrow tailoring.¹⁸⁶

Some courts despair at the complexities such categorical tailoring demands implicate. Perhaps the most forthright such response was that of the Second Circuit in Rocco Luiere's case, where the court noted that:

the fact that a particular governmental decision to use classifications based on race or national origin in a particular context passes strict scrutiny does not relieve those

¹⁸² See 488 U.S. at 504.

¹⁸³ *Id.* at *31-32 (emphasis added).

¹⁸⁴ See *Houston Contractors*, 993 F. Supp. at 555 (criticizing Texas for employing generic affirmative action categories that fail to take into account Texas's specific racial history and social context).

¹⁸⁵ *Montana Contractors*, 460 F. Supp. at 1178; see also CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES 175 (1996) (distinguishing the social position of Aleuts in Anchorage from that in Richmond). In fact, Hawaii does not include Japanese in affirmative action, having devised more focused categories tailored to its diverse Asian populace.

¹⁸⁶ See *Hopwood*, 78 F.3d at 932.

categories of their possible arbitrariness and unreliability . . . Indeed, we find it difficult to imagine what a “correct” racial classification would be. It will always exclude persons who have individually suffered past discrimination and include those who have not.¹⁸⁷

The Second Circuit “solved” the problem by denying that narrow tailoring applied.¹⁸⁸

Other courts have veered to the opposite extreme, unable to accept the idea that “[b]y its very nature, [a race-conscious] program is both underinclusive and overinclusive.”¹⁸⁹ These courts regard the problem as effectively fatal.¹⁹⁰

Yet, arguably, neither extreme deference nor presumptive invalidity is appropriate. Race is messy, and there are no perfect answers. But this does not mean we should give up trying. Narrow tailoring has never been held to require a perfect fit. Moreover, the Supreme Court has repeatedly insisted that when it comes to affirmative action, strict scrutiny must not be “strict in theory, but fatal in fact.”¹⁹¹ Therefore, this means finding “a permissible middle ground . . . between the entirely individualized inquiry of a Title VII lawsuit, for example, and an unconstitutionally sweeping, race-based generalization.”¹⁹²

How then should such a “permissible middle ground” be defined? Equally importantly, on what basis can we assess categorical validity to

¹⁸⁷ 2006 U.S. App. Lexis 4050 at *33-34. *See also Peightal*, 26 F.3d at 1561 n.25 (decrying the “troubling” and “vexatious” nature of group definitions because of the sheer “irrationality” of race).

¹⁸⁸ *Id.* Oddly, the Second Circuit accepted categorical tailoring applied to overinclusiveness. Its holding only rejected tailoring claims based on underinclusiveness.

¹⁸⁹ *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1580 (D.Colo. 1997).

¹⁹⁰ *Id.* (finding “it difficult to imagine a race-based classification that is narrowly tailored”); *see also Ritchey Produce*, 1997 Ohio App. LEXIS 4590, *6 (same); *Houston Contractors*, 993 F. Supp. at 557 (“[r]ace has never been either narrow or accurate”).

¹⁹¹ *Adarand Constructors, Inc.*, 515 U.S. 200, 237 (1995); *Grutter*, 539 U.S. at 326.

¹⁹² *Adarand*, 228 F.3d at 1186 (rejecting the district court’s tailoring analysis because “[r]equiring that degree of fit would render strict scrutiny “fatal in fact”).

make such determinations? The arbitrary basis on which the quadrangle was created, as well as its internal heterogeneity, and lack of responsiveness to local context counsel against blind deference to the status quo. But before we reject the quadrangle as an inadequate “map” to locate racial disadvantage,¹⁹³ we need a way to construct better categories to count with.

F. An Epistemology of Race and The Limits of Judicial Scrutiny

As we have seen, courts on both sides of the definitional debate have endorsed a functional test to map racial meaning based on commonalities of experience.¹⁹⁴ Crudely put, this asks whether we can expect bigots to discriminate equally against Japanese and Pakistanis before we lump into the same category.¹⁹⁵ Operationalizing such a standard, however, presents a formidable challenge. It can be divided into three parts: The first is normative: We need to identify the function of race in affirmative action.¹⁹⁶ The second challenge is methodological: Assuming we know what we are looking for, how do we measure it and map out its boundaries? Third, we must address the question of context—where should we gather the relevant data? nationally? regionally? within a single industry? or across society?

Discussion of normative issues will be deferred until Part II-D. For now, let us continue to use discrimination as our reference point, without defining it further. The questions then become how and where do we look

¹⁹³ *Amicus* scholars, *supra* note xxx, at 879.

¹⁹⁴ This might be caricatured as “Hispanic is as Hispanic does” (or is done to). In particular, we need to understand how race functions in terms of salient social phenomena targeted by affirmative action.

¹⁹⁵ In diversity terms, the question might be whether Samoans and Sri Lankans bring a set of shared perspectives to the classroom. And we also need to establish that such commonalities set these groups apart from others.

¹⁹⁶ This can be understood in different ways—from the effects of racial stereotypes to the value of diversity in education. The relevant criteria will thus vary depending on the rationale behind a particular program. Are we looking for intentional acts of hostile bigotry? Lingering patterns of disadvantage? Structural barriers? Diverse perspectives in a classroom? Civic representation in elite institutions? *See infra* notes xx.

for it? To begin with, we need an empirical basis to detect discrimination. In *Croson*, we already possess one such a tool. It uses disparities as a proxy for discrimination. *Croson* uses such disparities to answer the selection question (i.e. who qualifies for a remedy), but, in theory, we could answer the definition question this way as well. Examining the underrepresentation of racial subgroups could help us design better categories to count with and thus ensure more narrowly tailored remedies. For example, to decide whether to include Iberians in our definition of “Hispanic,” we could count Iberians separately. If our findings for the subgroup diverge significantly from the group as a whole, we would adjust our definition of “Hispanic” thereafter to exclude them.¹⁹⁷

The problem with this approach is that *Croson* restricts the context in which such counting occurs. Data on subgroups might be inadequate to assess disparities in highly particularized contexts.¹⁹⁸ For example, there are likely not enough Iberian highway contractors in New York City to generate statistical findings with any confidence. *Croson*’s focus on a narrow context thus requires us to work with broader group categories, which, as we have seen, risks over- or under-inclusiveness.

To avoid such narrow tailoring concerns, we need another way to look at subgroups and refine our category definitions. Particularized underrepresentation is not the only way to locate discrimination. To narrow the focus to subgroups, we must broaden the context. Instead of examining Hispanic contractors in one industry, we could undertake a broader assessment of societal prejudice against various plausibly “Hispanic”

¹⁹⁷ If this approach worked, we could also eliminate a step by making underrepresentation of subgroups the *sole* determinant: i.e. counting not just Iberians, but also Brazilians, Argentineans, every other national origin subgroup separately.

¹⁹⁸ This problem already affects groups such as Native Americans whose numbers are often too small to generate statistically meaningful evidence. As a result, Native Americans have been omitted from many municipal contracting programs.

subgroups to see which ones seem most likely to be victimized by racial bias.¹⁹⁹

Shifting to a societal focus to answer the definition question makes sense, since the goal is not to identify discrimination with the specificity necessary to justify a remedy, but rather to assess the pathways such discrimination is *likely* to follow as an initial step. This preliminary definitional analysis would allow us to refine our categories definitions which would then be used in the ensuing “selection phase” to detect particularized discrimination with increased confidence.

Courts that have engaged in “categorical tailoring” do appear to rely implicitly on such societal assessments. In disagreeing as to whether Iberian-Americans should be counted as “Hispanic,” the Second, Seventh, and Eleventh Circuit all framed the issue as whether Iberians faced discrimination in a broader sense than the particularized context at issue. That said, how do we resolve the issue? Whether or not Iberians face societal discrimination is an empirical question.²⁰⁰ Yet, in none of these cases was any attempt made to answer through evidence. Instead, such courts justified their underlying intuitions by manipulating the burden of proof²⁰¹ or relying on generalized *ipse dixit* as to the “nature of discrimination.”²⁰²

This brings us back to the challenge that Justice Powell saw as intractable. Since almost every ethnic group has experienced discrimination

¹⁹⁹ This shift to a societal focus could still be confined to a localized context such as New York City. An alternative approach would be to look at data on Iberian highway contractors nationwide and interpolate those findings to the local context, as Richmond tried to do in *Croson* in relying on findings by Congress. *But see Jana-Rock*, 2006 C. App. Lexis 4050, (rejecting *Croson* to preclude that approach).

²⁰⁰ The answer is unlikely to be all or nothing. One might express the perceived “Hispanic-ness” of Iberians in percentage terms of how often they are identified as *Latino* relative to other Hispanic subgroups. Perhaps over fifty percent would be the cutoff.

²⁰¹ *Ritchey*, 707 N.E.2d at 927; *Builders Ass’n*, 256 F.3d at 647.

²⁰² *Builders Ass’n*, 256 F.3d at 642.

to some degree, he saw no principled basis to choose between them. Unable to evaluate such “amorphous” claims judicially and unwilling to defer to political bodies lest “racial classification[s become] merely the product of unthinking stereotypes or a form of racial politics,”²⁰³ the Court has rejected societal discrimination as a justification for affirmative action.

Instead, the Court redirects the analysis to particularized contexts, focusing on underrepresentation in local contracting or diverse viewpoints of individual candidates. It seeks comfort in statistics to sort through the complexities of race. Yet, by telling us how to count, but not whom, the Supreme Court answers only half the Who Question.

Such omission cannot be merely accidental. After four decades of affirmative action litigation, if the Court had wanted to probe the logic of racial categories, it surely could have found a way to do so.²⁰⁴ The comments of individual justices writing outside the majority betray a noticeable disquietude at the unanswered questions the Who Question raises. Several members of the Court have pressed the issue of over-/underinclusiveness writing outside the majority, arguing that singling out certain minority groups but not others for preferred treatment may violate equal protection.²⁰⁵ Justice Kennedy also questioned the politics underlying

²⁰³ *Croson*, 488 U.S. at 497, 506, 510.

²⁰⁴ The Supreme Court selects the cases it wants to review through grant of certiorari and can direct parties to brief additional issues it deems relevant. *Cf.* Pildes & Niemi, *supra* note xx, at 498 (noting in a different equal protection context that “[t]he Court could have asked the parties to address or reargue” a racial issue and ascribing the Court’s failure to do so to “the caution and tentativeness that characterizes the current Court’s approach to race.”)

²⁰⁵ For example, Justice Douglas questioned the preference shown to Filipinos, but not Japanese by the University of Washington. *DeFunis v. Odegaard*, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting). Likewise, Justice Powell suggested that the list of groups targeted by University of California was both underinclusive *Bakke*, 438 U.S. at 309 n.45. (“The University is unable to explain its selection of only the four favored groups.”) and overinclusive, *id.* at 310 (“The inclusion of [Asians] is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process). *See also* *Metro. Broadcasting Inc. v. FCC*, 497 U.S. 547, 633 (1990) (Kennedy, J. dissenting) (criticizing enumeration of preferred racial groups as underinclusive); *Fullilove*, 448 U.S.

specific category definitions.²⁰⁶ Yet, with the exception of *Croson*'s brief aside, the Court's majority and plurality opinions have stuck doggedly within the confines of a majority/minority framework.²⁰⁷

Viewed in this light, the Court's failure to address the constitutionality of racial category-making can be seen as part of a larger pattern running through much of the Court's recent cases, namely the profound discomfort which the Court exhibits in coming to terms with race. In contrast with the racial jurisprudence of the nineteenth century where courts freely indulged in the racial classification game,²⁰⁸ the modern Court shuns such inquiries, because it recognizes that there are no easy answers. Racial classifications, the Court has belatedly acknowledged, reflect social conventions more than biological truth.²⁰⁹ Rather than stray into such subjective and sensitive terrain, the Court prefers to rhetorically distance itself from the social reality of race, referring to it instead in terms of its most superficial attribute—skin color.²¹⁰

Indeed, the very model of strict scrutiny that defines the modern Court's equal protection jurisprudence posits race as an irrelevant, even distasteful phenomena to be tolerated only under extreme circumstances.²¹¹

at 537-39 (Stevens, J., dissenting) (suggesting that selection of preferred classes failed a rational basis test); *Wygant*, 476 U.S. at 267, 284 n.13 (opinion of Powell, J.).

²⁰⁶ *Grutter*, 539 U.S. at 393 (Kennedy, J. dissenting) (relating attempt to exclude Cubans from Hispanic group "on the grounds that [they] are republicans").

²⁰⁷ See *Fullilove*, 448 U.S. at 486 ("[t]here has been no showing in this case that Congress has . . . exclud[ed] from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed."); *Bakke*, 438 U.S. at 359 n.35 (1978) (Opinion of Marshall, Brennan, Blackmun, and White) ("We are not asked to determine whether groups other than those favored . . . should similarly be favored. All we asked to do is to pronounce the constitutionality of [the affirmative action]").

²⁰⁸ HANEY LÓPEZ, *WHITE BY LAW*, *supra* note xx.

²⁰⁹ *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987).

²¹⁰ See Gotanda, *supra* note xx, at 3, 40. An extreme example of such rhetorical distancing is Justice Thomas' dissent in *Grutter*, 539 U.S. at 355 n.3 (likening racial preferences to an "aesthetic" of skin color).

²¹¹ Instead of engaging in the "variable sociological and political analysis" required to

The problem with a doctrinal structure premised on dismissing race as an irrelevancy is that affirmative action is one area where, by hypothesis, race does matter.²¹² So long as one accepts that racially-explicit group remedies may, in some circumstances, pass constitutional muster, recognition of the salience of group identities becomes unavoidable.

Focusing on particularized contexts does not so much answer this larger societal question as deflect it. Relying on numbers to answer the Who Question abstracts the question of group selection from the issue of group definition. In doing so, the Court avoids an inquiry into the underlying societal significance of race at the cost of continued definitional ambiguity. Moreover, permitting policy-makers to rely on the quadrangle by default means counting with categories that are themselves suspect, the product of the same “unthinking stereotypes or . . . racial politics” that the Court has feared all along.²¹³

At what point then does a court become obligated to pierce the statistical curtain of disparity studies and probe the logic of category-making behind it? While the Supreme Court can rely on docket control to avoid answering awkward questions, lower courts have no such luxury. As the Who Question is increasingly raised in affirmative action litigation, courts have begun to press its definitional aspects through the rubric of narrow tailoring. Yet, the Supreme Court’s silence has led to doctrinal confusion. Courts also lack access to the kind of empirical evidence the Who Question demands.

unravel the complexities of race (to use Justice Powell’s terminology), the Court instead treats race as a Gordian knot, a tangle of “suspect” and “corrosive” stereotypes to be cut through by strict scrutiny.

²¹² See *Grutter*, 539 U.S. 306 (majority); *Gratz v. Bollinger*, 539 U.S. 244, 299-301 nn.1-7 (2003) (Ginsburg, J., dissenting) (giving statistics to document).

²¹³ *Croson*, 488 U.S. at 510 (opinion of O’Connor, J.).

To confront the Who Question ultimately means navigating the minefield of race and addressing its enduring significance in society. Faced with this challenge, Justice Powell recoiled, declining to engage in the “variable sociological and political analysis” required.²¹⁴ Indeed, not only Powell questioned whether such analysis was feasible, but also whether it would be desirable.²¹⁵ Instead, Justice Powell retreats into a kind of historical relativism in which everyone has suffered and thus no one claim stands above another. As an empirical matter, this accounting of racial equities seems seriously flawed. Even if other groups have suffered historically, the real issue is where do the effects of discrimination linger today.²¹⁶ Justices O’Connor and Powell seem to confuse this point almost willfully. They situate societal discrimination entirely in the past and then plead helplessness before the fog of history.

This deliberate distancing of constitutional equality review from the societal realities of race has long been subject to a broader critique by constitutional scholars and critical race theorists.²¹⁷ Such critics have argued for an alternative approach that would contextualize the Court’s inquiry and redirect affirmative action toward eradicating societal hierarchies.²¹⁸ In *Gratz v. Bollinger*, Justice Ginsburg cites a wealth of social science research documenting the enduring racial disparities which persist “[i]n the wake of ‘a system of racial caste system only recently

²¹⁴ *Bakke*, 438 U.S. at 297. On its face, Powell was merely stating that this analysis lay outside the judicial competence. However, neither he nor any other member of the Court has suggested that a societal analysis conducted by any other branch of government would past muster.

²¹⁵ *See id.*

²¹⁶ *See Fullilove*, 448 U.S. at 463 (purpose of preferential remedies is to address present effect of past discrimination).

²¹⁷ *See*, e.g. Sunstein, *supra* note xx, at 1314-18; Gotanda, *supra* note xx, at 40-47.

²¹⁸ The Court has taken notice of *de facto* caste systems in other contexts. *See Hernandez*, 347 U.S. at 476-77 (describing social exclusion of Mexican-Americans). *Cf.* Haney López, *supra* note xx, at 1163 (arguing for generalization of *Hernandez* approach).

ended.”²¹⁹ Members of racial minorities—in particular Hispanics and Blacks—are shown to fare much worse than Whites across a wide range of societal indicators.²²⁰ Such scholarship would seem to belie Justice O’Connor’s claims that the effects of societal discrimination are “inherently unmeasurable.”

As a prudential matter, however, was Powell right? Even if societal evidence *could* be meaningfully evaluated by the Court, should it decline the opportunity? Is dabbling in racial reengineering on a societal scale sufficiently fraught with danger that it should be avoided? Other members of the Court have conjured similarly ominous visions of such a project, invoking Nazi Germany and Apartheid South Africa as the legal precedents we would have to draw upon.²²¹ Yet, these admittedly distasteful examples do not exhaust the list of available models. There is another country which has committed itself to societal reengineering which may offer a more appealing precedent. That country is India.

II. Lessons From Abroad: Does India Hold the Answer?

A. India’s Empirical Approach

Like the US, India is a diverse, multi-ethnic democracy struggling to overcome the legacy of centuries of officially-sanctioned segregation and discrimination. Although Indian affirmative action focuses on caste, not

²¹⁹ See *Gratz* 539 U.S. at 299 (Ginsburg, J., dissenting) (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 273 (Ginsburg, J. dissenting)).

²²⁰ See *Gratz* 539 U.S. at 299-303 & especially nn.1-9 (2003) (Ginsburg, J., dissenting). An *amicus* brief submitted by the American Sociological Association offered an even more comprehensive compilation of scholarship on racial disadvantage. See Brief of the American Sociological Association, et. al., 2002 U.S. Briefs 241 (2003).

²²¹ *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) (suggesting that objective administration of racial classifications will require emulation of Nazi Reich’s Citizenship Law of November 14, 1935); *Metro. Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (facetious citation to Apartheid statute from South Africa).

race, there are close parallels. In both cases, beneficiary groups are defined primarily by ancestry (unlike, e.g. Brazilian affirmative action which is based on color).²²² India and the US also share the common challenge of sorting through competing claims to entitlement from a diversity of groups (unlike, e.g., in Malaysia or Fiji, where affirmative action focuses solely on one group).²²³ Like the US, India operates under a Common Law tradition. Moreover, its written constitution interpreted by an activist judiciary adheres closely to the US model of public law.²²⁴

Unlike the US Supreme Court, however, which rejected any attempt to measure societal discrimination, India has developed a rather sophisticated methodology to measure such effects empirically. A series of high-profile national commissions have studied the problem, and the selection criteria they developed have been extensively litigated, with several cases reaching the Indian Supreme Court.

The purpose of affirmative action in India is to remedy the societal effects of caste discrimination.²²⁵ The caste system began as a hierarchical system of social ordering within the framework of traditional Hindu belief. Based on birth, caste membership determined one's station in society. Groups at the top of the hierarchy enjoyed superior resources, status, and privilege, while those at the bottom endured ostracism and abuse.

Broad parallels exist between Indian caste and American race. There were five categories in the traditional caste system—not unlike the five racial groups we identify in the US. Ranked in descending order in the

²²² Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 CONN. L. REV. 787 (2004).

²²³ SOWELL, AFFIRMATIVE ACTION, *supra* note xx.

²²⁴ Cunningham & Menon, *supra* note xx. In this respect, India's legal system has more in common with the US than other common law systems whose adherence to traditional English notions of parliamentary supremacy and unwritten constitutionalism inhibit the role that courts play in policy-making.

²²⁵ Indira Sawhney v. Union of India, (1992) 3 SCC.C.C. 217 (1992).

hierarchy, Brahmins, Kshatriyas, Vaishyas, and Sudras made up the four official castes or *varnas*. Beneath them (and outside the formal caste system) were the “outcastes,” or so-called “untouchables.”

At each of these five levels, the broader categories divide into smaller caste groups known as *jatis* (or *jats*), just as racial groups in the US are sometimes broken down by ethnicity or national origin.²²⁶ The *jatis* were the focus of caste identities; they determined what you did for a living, where you lived, the deities you worshipped, the foods you ate, and whom you could marry.²²⁷ Even today, such identities exert powerful influence on Indian life. To be born to a lower caste retains an enduring stigma.

Officially, caste discrimination has been banned. Yet, as with Segregation in the US, patterns of disadvantage continue. And because the caste system had a pyramidal structure, there are many groups in the lower echelons that can plausibly claim to experience such disadvantage—not unlike the “majority of minorities” that Justice Powell talked about in *Bakke*. However, where Powell rejected any attempt to choose between competing groups, India does exactly that.

The starting point in this process remains the caste hierarchy. For the groups at the very bottom—the so-called Scheduled Castes and Tribes—traditional status alone determines eligibility.²²⁸ Under the Indian constitution, these groups are automatically allotted a “reservation” (quota) for all civil service jobs, university admissions, and electoral representation.²²⁹

²²⁶ JENKINS, *supra* note xx at 85.

²²⁷ check on deitiesXXX caste elders as governance.

²²⁸ The Scheduled Castes consist mostly of the former untouchables (now known as Dalits), while the Scheduled Tribes comprise tribal groups isolated from mainstream society.

²²⁹ JENKINS, *supra* note xx at 2.

For a much larger group of affirmative action beneficiaries, however, known as the “other backward classes” (or OBCs), caste disadvantage is no longer presumed from traditional status alone.²³⁰ Some lower caste groups (*jatis*) have become landowners and gained political power. Others have moved to urban areas where economic opportunities enable upward mobility. Therefore, in order to be included in affirmative action set-asides, each *jat* has to demonstrate that it’s still “backward”—a term of art in Indian affirmative action law.²³¹

The process of identifying “backward classes” remains the responsibility of provincial government as caste differences vary by region. “Backwardness” is determined empirically by looking at a wide range of socio-economic indicators, analyzed on a group-by-group basis. In other words, the caste (*jat*) as a whole is the unit of analysis. The criteria examined are specifically chosen to identify the systemic effects of caste disadvantage.

Both the breadth of criteria and level of detail to which such analysis extends are impressive. One standard form used to collect this information runs over seventeen pages.²³² The factors considered include the average income and education level of caste members,²³³ literacy rates, occupational profiles,²³⁴ land-ownership, capital resources, political representation (i.e. number of caste members occupying elective or civil servant posts),

²³⁰ The term “backward classes” comes from the Indian Constitution and has been interpreted to transcend traditional caste status and incorporate a broader assessment of social standing. *See* Balaji v. Mysore, A.I.R. 1963 S.C. 649. The OBC receive a separate quota from the Scheduled groups.

²³¹ *See* JENKINS, *supra* note xxx at 197-214.

²³² *See* “Questionnaire for consideration of requests for inclusion and complaints of under-inclusion in the central list of Other Backward Classes” in Jenkins, *supra* note xxx at 197-214.

²³³ JENKINS, *supra* note xx at 208-209.

²³⁴ For example, the form inquires whether the caste is identified with a traditional occupation, whether such hereditary occupation is regarded as “lowly, undignified, unclear or stigmatized” or subject to bonded labor, and what proportion of the caste is still engaged in such occupation. JENKINS, *supra* note xx, at 204-205.

housing quality, and access to infrastructure (roads, electricity, irrigation, etc.). The form also inquires whether the caste's position has improved or deteriorated during the last twenty years and requires applicants to furnish names of other comparable caste groups.²³⁵

Wherever possible, the data are supposed to be disaggregated even below the *jat* level. Thus, if an identifiable subgroup of the caste is doing much better than the others, "backwardness" should be appraised for each part separately so that the more "forward" part can be potentially excluded. Similarly, individual caste members who have enjoyed unusually privileged background may also be deemed ineligible.²³⁶

In other words, India attempts to choose beneficiary groups using precisely the "sociological and political analysis" that Justice Powell thought couldn't or shouldn't be attempted in the US. However, rather than attempt to sort between competing historical claims of past discrimination, India focuses on the here and now. The idea is that groups shown to experience systemic disadvantage across a wide array of societal indicators can be presumed to be the ones most afflicted by discrimination. Thus, instead of accepting the existence of caste hierarchies as frozen in time, India defines caste functionally in terms of subordination.

In drawing inferences of discrimination from empirical measures, Indian methodology superficially resembles the underrepresentation model of *Croson*. Both rely on counting to determine affirmative action eligibility. However, very different kinds of counting are involved: Whereas India focuses on societal disadvantage, *Croson* confines its analysis to particularized contexts. India also employs a multifactoral, systemic

²³⁵ *Id.* at 214.

²³⁶ This skimming off of the so-called "creamy layer" of caste elites is constitutionally required. See *Indra Sawhney* 3 S.C.C. 217. Thus, OBC membership only creates a rebuttable presumption of eligibility.

analysis, whereas counting in the US focuses solely on a single indicator: group representation.

The units being counted are also sized very differently. Most disparity studies under *Croson* collect statistics based on the standard four “minority” categories, roughly analogous to India’s *varnas*. Tongans are thus lumped together with Bangladeshis in a pan-Asian grouping. By contrast, India’s counting focuses on the *jatis*—the smaller units that make up each *varna*, the equivalent of counting Samoans and Bangladeshis separately. Unlike the US, India’s regional analysis is also sensitive to local variations in caste identities.

Fundamentally different assumptions underlie these quantitative measures. In the US, a statistically significant disparity is taken as *prima facie* evidence of unlawful discrimination. At least in theory, the counting is supposed to uncover actual “statutory or constitutional violations” traceable to the very institution seeking to grant the remedy. By contrast, India makes no effort to assign individual responsibility. It seeks to measure the systemic effects of enduring caste discrimination irrespective of their cause.

To some extent these different emphases can be ascribed to differences in the way race and caste are conceived. In the US, race is often considered an immutable trait, inhering in highly visible—albeit superficial and morally irrelevant—characteristics such as skin color. Racial discrimination is conceived of in terms of discrete acts of irrational prejudice triggered by such phenotypic stimuli.²³⁷ Remedying discrimination thus entails neutralizing individual bad actors as opposed to broader institutional change.²³⁸

²³⁷ Gotanda, *supra* note xx, at 45.

²³⁸ *Id.*

In India, however, caste is less associated with immutable traits, but instead inheres in explicit social hierarchies. Since caste is itself defined societally, it is more natural to think of caste discrimination as a societal problem that must be addressed systemically.

B. From India to the US: Applying the Model

For some, the Indian approach based on societal disadvantage offers a more attractive means of selecting beneficiaries. The preoccupation with identifying intentional bias in US law has been criticized for employing unrealistic assumptions about the etiology of discrimination.²³⁹ Rather than focusing myopically on identifiable “bad actors,” commentators have stressed the need to address systemic patterns of disadvantage.²⁴⁰ Several have called for the Fourteenth Amendment to be reinterpreted to move from an “antidiscrimination model” to an “antissubordination model.”²⁴¹ In proposing such a paradigm shift, Cass Sunstein uses the metaphor of a “Constitution of Caste,” and, in fact, his definition of “caste” in terms of systemic societal disadvantage is reminiscent of the way India actually goes about identifying “backwardness.”²⁴²

²³⁹ See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251.

²⁴⁰ Alan David Freeman, *Legitimizing Discrimination through Equal Protection* 62 MINN. L. REV. 1049 (1978) (contrasting “perpetrator vs. victim” perspectives on discrimination). Some commentators also argue that the Court’s existing jurisprudence already contains the seeds for such a paradigm shift. E.g. Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997).

²⁴¹ See, e.g. Owen M. Fiss, *Groups and the Equal Protection Clause*, PHILOSOPHY AND PUBLIC AFFAIRS 5; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003; Haney López, *supra* note xxx.

²⁴² See Cunningham & Menon, *supra* note xx (commenting on Sunstein’s paper and drawing explicit comparisons with the Indian example); see also Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311. Cf. Gratz, *supra* note xx at 299-300 (Ginsburg, J. concurring) (similarly likening America’s racial inequalities to a caste system).

That India offers a working model of an antistatutory program has not gone unnoticed by scholars of comparative affirmative action.²⁴³ In advocating India's approach to the US Supreme Court, the *amicus* scholars made the case that by penetrating the "amorphous" nature of societal discrimination, the empirical validation supplied by Indian methodology could overcome jurisprudential resistance to societal remedies.²⁴⁴ On its face, the multifactoral analysis applied under the Indian approach does seem like a more rational answer to the Who Question. Whereas *Croson* tells us simply to count heads without much thought about their underlying meaning, India employs empirical measures specifically chosen to correlate with the social phenomenon being targeted. Moreover, by analyzing the narrowest possible units—*jatis* instead of *varnas*—using definitions tailored to local context, the Indian approach achieves a greater degree of precision which helps to avoid under- or under-inclusive remedies and thus reduces the concern over definitional issues.²⁴⁵

India is able to work with smaller units because it is looking at caste societally, using a composite of many factors to map social hierarchies. In looking at this broader picture of underprivilege, group size becomes less of a limitation than with *Croson*'s statistical analyses of representation. By determining affirmative action eligibility through a centralized process, India's approach is also more efficient than the multiple disparity studies that *Croson* demands for every particularized context.

²⁴³ Cunningham & Menon, *supra* note xx; *amicus* scholars, *supra* note xx, at 874-75.

²⁴⁴ *Amicus* scholars, *supra* note xx at 874, 881 ("India's experience shows without a doubt that it is possible to design a program to remedy the effect of past discrimination in which beneficiary groups are designated through an objective process based on empirical research").

²⁴⁵ Smaller groups also generally have better defined identities, a phenomenon that applies in the US as much as in India. *See infra* notes xx. Therefore, while counting small groups does not eliminate definitional ambiguity, it minimizes it.

How might such a model translate to the US context? To return to the case of Rocco Luiere, recall the key question was whether Iberians experienced the same patterns of racial disadvantage as other Hispanics. Applying Indian methodology, this question could be answered by analyzing empirical data.

The idea would be to use societal disadvantage as a proxy for racial prejudice. This would entail gathering statistics on Iberians and other Hispanic subgroups, using appropriate criteria chosen to quantify patterns of racial subordination in the US.²⁴⁶ This might include examining access to education, average household wealth, patterns of residential segregation, rates of inter-racial marriage,²⁴⁷ political representation, and a host of similar criteria. If it turns out that Iberians do much better on these measures than *Latinos*, this could mean they're not experiencing the same patterns of discrimination.²⁴⁸

In fact, data from the 2000 US Census reveals that on several such measures, Iberians *are* differently situated from other Hispanic groups. They are significantly wealthier, better educated, and engaged in higher status occupations than Mexican-Americans and Puerto Ricans, who make up the bulk of US Hispanics²⁴⁹; indeed, on many measures Iberians outperform the US population at large. Almost twice as many American Spaniards, for example, hold a graduate degree than the US average; they are 25% better represented in managerial or professional occupations; and

²⁴⁶ See *Amicus* scholars, *supra* note xx at 873 n.216 (pointing to intermarriage rates and patterns of "White flight").

²⁴⁷ *Id.*

²⁴⁸ As in India, a contextualized analysis would be required to account for possible regional variations.

²⁴⁹ Mexican-Americans (or Chicanos) are by far the largest Hispanic subgroup represented almost 60% of the total. Puerto Ricans account for just under 10%. See Table III for census data on Hispanic subgroups.

they own homes valued at 36% above the national median.²⁵⁰ Mexican-Americans and Puerto Ricans living on the US Mainland, by contrast, rank well below the US average on all of these measures.²⁵¹

Table III - Socioeconomic Breakdown of Hispanic Subgroups

Population Group	Education		Occupation	Property	Income
	% earning degree		Managerial or	Median Home	% below
	Bachelors	Graduate	Professional	Value	Poverty Level
ALL US	15.5%	8.8%	33.6%	\$119,600	12.4%
HISPANIC	6.7%	3.8%	18.1%	\$105,600	22.6%
Argentinean	16.2%	19.0%	42.5%	\$180,000	13.8%
Spaniard	16.2%	13.7%	42.0%	\$162,100	12.7%
Portuguese	13.0%	6.0%	29.9%	\$160,100	8.1%
South American	14.5%	10.6%	27.7%	\$153,100	15.0%
Cuban	11.5%	9.6%	31.6%	\$135,700	15.0%
Central American	6.2%	3.4%	13.3%	\$131,400	19.9%
Puerto Rican	8.3%	4.2%	24.2%	\$112,500	26.0%
Mexican	5.0%	2.4%	14.9%	\$95,300	23.5%
BLACKS	9.5%	4.8%	25.2%	\$80,600	24.9%

Source: 2000 U.S. Census

If one accepts such societal indicators as appropriate criteria to determine affirmative action eligibility, the case for including Iberians seems weak.²⁵² Even if the popular consensus would regard them as Hispanic, they appear less burdened by the systemic handicaps associated with the larger group.²⁵³ It may be that the success of Spaniards comes in spite of race, not because of it. But it is also possible that these differences

²⁵⁰ Portuguese-Americans do slightly less well than Spaniards on these measures. They are somewhat *less* likely to hold a college degree or be a manager/professional than the average US resident. But they experience poverty at only 2/3 the national rate and the median value of their homes exceeds that of the general populace by 34%. *See* Table III.

²⁵¹ Mexican-Americans, for example, earn graduate degrees at a quarter the rate of the US average, they are only half as well represented in the managerial/professional classes, and their home values rank 20% below the national median. *See* Table III.

²⁵² A similar argument could be made for excluding Hispanics of South American and Cuban origin. Argentine-Americans fare particularly well on these measures, outstripping even Spaniards.

²⁵³ The popular consensus is, in any case, influenced by the terms on which formal race categories are constructed. Shifting to a narrower *Latino* classification would arguably reduce the tendency of the public to associate Iberians with other Hispanics.

in societal standing reflect genuine difference in how such subgroups experience race. Scholars have identified intra-Hispanic disparities based on skin color.²⁵⁴ The lighter skin and European features of Spaniards could permit them to function more easily in mainstream US society. It is also possible that class differences may themselves insulate societally successful Hispanics from the patterns of prejudice that other group members encounter.

This does not mean that Rocco Luiere would never encounter racial prejudice, but it does suggest that Iberians, like Jews or Irish, have learned to navigate around it. And we may want to focus our affirmative action efforts on groups that *are* being held back. Since most affirmative action definitions of “Hispanic” still do include Iberians, a disadvantage approach would thus lead to a narrowing of eligibility. A disadvantage approach could also be used to resist new claimants. Rather than keeping out Persian-Americans on the spurious grounds relied on by the SBA, a similar result could be justified based on empirical data.²⁵⁵

The *amicus* scholars have proposed generalizing such inquiries to “redraw the map” around which our racial compass is oriented. They call for a “national bipartisan commission” to be convened to replace the standard categories of the quadrangle with “scientifically” redesigned groupings built around systemic disadvantage.²⁵⁶ Newly fashioned empirically-validated categories could then serve to allocate affirmative action remedies in a more targeted, rationally defensible fashion.²⁵⁷

²⁵⁴ See Edward E. Telles & Edward Murguía, *Phenotypic Discrimination and Income Differences among Mexican Americans*, 71 SOC. SCI. Q. 683 (1990).

Telles & Murguía, *supra* note xx.

²⁵⁵ Census data belies any claim that Persian-Americans face societal disadvantage systemically. [To be added to Appendix].

²⁵⁶ *Amicus* scholars, *supra* note xx at 880-81.

²⁵⁷ *Id.* at 882.

The *amicus* scholars appear to contemplate using India's model to answer the selection question directly based on societal disadvantage, as done in India itself. This Article argues against such an approach, but will suggest more modest definitional uses of Indian methodology.

C. Demographic Challenges

Assuming that constitutional objections to a societal approach could be circumvented, could an Indian-style disadvantage model provide a workable answer to the Who Question as the *amicus* scholars suggest? There are significant differences in moving to the US context that would complicate the analysis required to implement it. Moreover, even if such an approach proved workable, a further question remains whether the consequences would be desirable. Arguably, Justice Powell was right to resist societal rankings on prudential grounds. If so, the Indian model may serve as a negative example, more cautionary lesson than model to emulate. Exploring the reasons why points to some of the dangers lurking within the Who Question.

First, consider the demographic contrasts. India remains a largely rural society in which patterns of caste oppression have been entrenched literally over millennia.²⁵⁸ As a result, caste identities remain well defined. Most caste groups still live in their traditional villages and engage in time-honored occupations. Inter-caste marriage is virtually unknown. Given these relatively stable baseline conditions, Indian policy-makers can

²⁵⁸ Affirmative action has had some effect in empowering an elite drawn from at least some lower caste groups. However, its benefits have been limited in comparison to the pool of potential beneficiaries, and, as in the US, have generally gone to those who need it the least. Many lower caste groups, particularly those at the bottom end, are either not in a position to take advantage of affirmative action, or in many cases, are simply unaware of its availability. As a result, the SC/ST reservations often go unfilled. Jehangir S. Pocha, *Caste Prejudice, Red Tape, Access to Villages are Hampering Government's Relief Efforts*, S.F. CHRON., Feb. 15, 2005 at A10; SOWELL, *supra* note xxx, at xx.

generally presume that empirical disadvantage flows from the lingering effects of caste, as opposed to extrinsic causes.

By contrast, the United States is a nation of immigrants, with a high degree of geographic and social mobility. Although “ethnic niches” in the workforce still exist,²⁵⁹ occupational diversity is increasingly the rule. Ethnic and racial identities are not as well defined, and inter-racial marriage rates are rising. This makes the dynamics of group disadvantage much more difficult to model because it requires analyses of ambiguous and moving targets.

Dealing with immigration effects would present a particular challenge, one which the *amicus* scholars as well as many subordination theorists appear to overlook.²⁶⁰ Immigrants typically arrive in positions of relative disadvantage and then progress up the socio-economic ladder. In general, the longer they have been in the country, the better they do.²⁶¹ Such “immigration effects” skew socio-economic measures of status, and for groups with high rates of immigration, the distortions can be appreciable. If we consider affirmative action more properly aimed at targeting forms of racial disadvantage that go beyond such transitory phenomena, we would need appropriate adjustments to isolate patterns of “intractable disadvantage” unrelated to immigration.²⁶²

²⁵⁹ See generally Malamud, *supra* note xx, at 327-329.

²⁶⁰ The *amicus* scholars begin with a “mad bomber” parable that posits a model of lingering disadvantage traceable to a unitary injury at time zero. This model fails to address the phenomenon of immigration as an independent variable correlating with societal disadvantage. *Amicus* scholars, *supra* note xx, at 836.

²⁶¹ Many components contribute to success in navigating US society: familiarity with US customs, employment skills, language ability, social capital (“connections”), financial resources, etc. All of these take time to cultivate.

²⁶² Brest & Oshige, *supra* note xxx uses the concept “intractable disadvantage” to describe such multi-generational trends. Others might be even more demanding and seek to limit affirmative action solely to disadvantage that is *due to* (as opposed to merely correlative with) race.

This is more easily said than done. Adjusting for “immigration effects” requires dealing with myriad causal variables. Immigrants begin at differing starting points and their ability to progress also varies, based on the circumstances they face upon arrival.²⁶³ Many Hispanics have come across the border from Mexico or Central America, often illegally, from poor, rural communities, with little education, and then remain concentrated in linguistically isolated communities which resist assimilation.²⁶⁴ By contrast, Argentinean and Indian immigrants often arrive with higher education degrees in hand and go on to achieve greater successes.

In general, Asian immigrants seem more successful at economically integrating than Hispanics. Language ability may account for at least part of this discrepancy. Roughly the same percentage of Asians as Hispanics are recent immigrants.²⁶⁵ However, almost half of foreign-born Hispanics lack the ability to function adequately in English compared to just over a quarter of their Asians counterparts. About one in five Hispanic immigrants speak English “not at all” compared to a mere 5.6% of Asians. Accordingly, even legal Hispanic immigrants often remain excluded from opportunities for upward mobility. On the other hand, Hispanics do not seem to face the same barriers to spatial mobility as Blacks, suggesting that their segregation is more a cultural choice than a condition of racism.²⁶⁶ Second generation Hispanics are also much more likely marry outside their

²⁶³ See Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUBLIC CULTURE 577-606 (1998) (contrasting varying conditions met by Haitians vs. *Marielitos* in 1980s); Anthony DePalma, *15 Years on the Bottom Rung*, N.Y. TIMES, May 26, 2005 at A1 (contrasting Greek vs. Mexican immigrant experience).

²⁶⁴ GRAHAM, *supra* note xx, at 182-183; DePalma, *supra* note xx.

²⁶⁵ 2000 U.S. Census data, on file with the author.

²⁶⁶ See Douglas Massey & Nancy Denton, *American Apartheid: the Perpetuation of the Underclass*, in John Arthur & Amy Shapiro, ed., COLOR CLASS IDENTITY: THE NEW POLITICS OF RACE, 138-39 (1996).

racial groups than African-Americans, suggesting less ingrained racial antipathy against them.²⁶⁷

Nonetheless, there are clearly some Hispanic communities that have been held back for generations at least partly due to racism. Isolating such “racial effects” from other contingent variables requires making a number of subjective assumptions about the dynamics of racial prejudice, “institutional racism,” and the uncertain divide between culture and race,²⁶⁸ all of which would severely test our understanding of “race” as a construct.

Faced with such a demographic and sociological challenge, even the best social scientists given infinite time and resources might find it difficult to choose between competing claims of disadvantage in a way that would be generally accepted as fair, even assuming we could agree on what we were looking for.

D. Politicization and Backlash

In any case, in the real world, we should not expect that “disadvantage” would be determined through neutral social science because the whole process would inevitably become politicized. Competing interest groups would lobby for favorable criteria and attempt to “game” the system. Threshold standards would be hard to maintain. All of this has happened in India. Reservation politics has influenced election campaigns and attracted corruption. New groups are constantly being added to the OBC ranks, but very few ever get taken off the lists.

²⁶⁷ See GRAHAM, *supra* note xx, at 193.

²⁶⁸ For example, is it really race that explains why Jamaicans succeed in place of Afro-Americans? If one says Jamaicans have a stronger work ethic, that’s cultural. But if one says that domestic Blacks have a reputation for being lazy, that’s racist stereotyping. Similarly, rates of exogamy (intermarriage) are often viewed as a proxy for societal prejudice. Yet, some groups exhibit preferences for endogamy for cultural reasons that have nothing to do with how outsiders view them.

In this sense, the idealized account of Indian methodology provided by the *amicus* scholars requires a dose of legal realism. Given the more complex and contestable terrain which the implementation of a “disadvantage model” in the US would have to negotiate, one might expect the scope for politicization and manipulation of the process to increase.

We already see a similar politicization of the disparity testing that contracting programs do under *Croson*, which critics have accused of relying on phony social science to achieve predetermined ends.²⁶⁹ And as we saw, the process of creating the categories we now use to count with was also not without its politics. Yet, disparity testing is confined to a particularized context, and usually involves a contest between industry insiders, unbeknownst to the general public. Similarly, the racial prehistory of the quadrangle largely took place behind closed doors.

By contrast, moving to an Indian model would place the Who Question on a much more visible plane. Determinations as to “backwardness” concern the membership of the caste as a whole and involve a holistic assessment of group standing, not in a limited context, but globally in society. Making such assessments inevitably pits competing groups against one another in an adversarial process. At stake, is not just eligibility for one program in one sector, but affirmative action benefits across the board. The result is a much more competitive, high profile contest where the winners take all. Inevitably, caste consciousness has become sharpened, not reduced in the process.²⁷⁰

²⁶⁹ George R. LaNoue, *supra* note xx, at 12-13.

²⁷⁰ Clark Cunningham (one of the *amicus* scholars) has in subsequent writing acknowledged “the widespread concern in India that caste identity has become more salient, not less” since implementation of the Mandal Report’s methodology for identifying the OBC. Clark Cunningham *After Grutter Things Get Interesting! The American Debate Over Affirmative Action is Finally Ready for Some Fresh Ideas from Abroad*, 36 CONN. L.

This may seem an acceptable price to pay in a country where caste identities have already been entrenched as an instrument of oppression over three thousand years.²⁷¹ Yet, racial identities in the US are not so well-defined. As with our demographics, race presents a moving target. US census categories have changed dramatically over the years with all kinds of categories dropping in and out; they continue to be redefined today.²⁷²

These changes arguably reflect an organic evolution of racial identities, a process in which the legal categories used in affirmative action have generally lagged behind. The relative indeterminacy of such categories may therefore serve a positive value by enabling a space for further organic progression. Likewise, an avoidance of overt intergroup rivalries helps to minimize the hardening of such identities through forced political mobilizations. The Who Question thus has its tradeoffs. Gains in distributive or corrective justice from pursuing increased precision and clarity might be outweighed by sharpened group consciousness and polarization.²⁷³

The competitive element of Indian affirmative action has other troubling features. Because more “forward” groups tend to usurp a lion’s share of benefits, groups ranked lower down the hierarchy inevitably

REV. 665, 675 (2004). Affirmative action opponents in the US often describe similar polarizing effects here as well. *See, e.g.* Krieger, *supra* note xx. However, the identity of the privileged groups is relatively stable, and so there is less polarizing competition *between* minority groups.

²⁷¹ I do not mean to overemphasize the rigidity of caste identities in India or to deny the existence of grey areas. The formal categories used by the state (often the legacy of British colonial administrators) reflect an arbitrary and/or essentializing imposition of order on far more complex social reality. My point is only a comparative one. Most people could at least agree on a basic division of groups at the *varna* level (including its hierarchical ordering) and this consensus understanding has remained relatively stable over time.

²⁷² YANOW, *supra* note xx, at 83-85 (charting evolution of categories); *supra* notes xx.

²⁷³ Cunningham acknowledges “[t]he concern that the fruit of ‘strict scrutiny’ of group selection and definition might be a counter-productive perpetuation of racial identity.” Cunningham, *supra* note xx, at 675.

demand their own separate quotas. India already has two established tiers of beneficiaries, the Scheduled Castes/Scheduled Tribes having precedence over the Other Backward Classes. Competition within these groups has increasingly led to further distinctions whereby groups deemed “more disadvantaged” demand separate reservations, requiring ever more intricate rankings.²⁷⁴ Again, for a country dealing with the effects of an entrenched caste system, such inverted hierarchies may seem like an acceptable, even desirable remedy. South Africa has taken a similar approach: prioritizing affirmative action eligibility according to the degree of oppression that the various beneficiary groups experienced under Apartheid (which was itself a rigidly hierarchical system).²⁷⁵

Clark Cunningham has hypothesized an analogous remedial hierarchy in which Blacks and American Indians—the two groups that suffered the greatest historical injury in the US—would become privileged as claimants of affirmative action.²⁷⁶ Several courts have hinted that narrow tailoring may *require* that such distinctions be made.²⁷⁷ There is certainly a strong case to be made for African-American exceptionalism, and Cunningham is not the only one to advance it in the context of affirmative

²⁷⁴ SOWELL, *supra* note xx. The Indian Supreme Court recently struck down subquotas for the SC/ST as contrary to the constitutional mandate. However, the OBC apparently remain fair game for stratified remedies.

²⁷⁵ SOWELL, AFFIRMATIVE ACTION, *supra* note xx.

²⁷⁶ Cunningham, *supra* note xx, at 673 (drawing a further analogy comparing Black and Indians with, respectively, India’s Scheduled Castes and Tribes). Cunningham stresses in a footnote that the analogy is made for illustrative purposes only, not as an “import model.” *Id.* at n.37. However, there is a logical case to be made for such a proposal. It’s revealing, for example, that the SBA justified its MBE set-asides by emphasizing the unique historical experience of these two groups. *See* LaNoue & Sullivan, *Presumptions*, *supra* note xx, at 450 (quoting SBA interim rule explaining that “blacks had suffered ‘enslavement and subsequent disfranchisement’ and Indians had endured ‘near extermination’” while omitting explanation of other included groups).

²⁷⁷ *See Hopwood*, 78 F.3d at 955 n.50 (“one would intuit that the minority group that has experienced the most discrimination . . . would be entitled to the most benefit from the designated remedy.”); *Assoc. for Fairness in Bus. v. State*, 82 F. Supp. 2d at 353, 362 (D.N.J. 2000) (same); *Concrete Works*, 86 F. Supp. 2d at 1077 (same).

action.²⁷⁸ However, such an approach runs strongly against the grain of American egalitarianism. Even from start, when affirmative action was so clearly focused on redressing injustices against Negroes, policy-makers were reluctant to single out any one group for preferential treatment. This reluctance to play favorites in favoritism appears to be widely shared, even among African-Americans themselves.²⁷⁹ Similarly, it's notable that claims based on Native American singularity have focused on reclaiming traditional homelands and privileges rather than the sort of generalized preferences across society that indigenous groups, e.g., in Malaysia or Fiji have demanded through affirmative action.

Making such formalized reckonings of comparative disadvantage and entitlement would risk offending American egalitarian values. The US likes to think of itself as a classless society and a nation founded on universal equality. However imperfectly that ideal has been applied in practice, we would likely be uncomfortable with a hierarchical system of affirmative action that so overtly belied it. Even with a single-tiered system, the spectacle of groups competing in a collective airing of dirty linen would be one that many Americans would instinctively resist

Justice Powell averted to such concerns in *Bakke* when, after dismissing a sociological ranking of racial disadvantage as outside the judicial competence, he questioned whether such rankings would even be

²⁷⁸ See *Bakke*, 438 U.S. at 400 (Marshall, J., dissenting); Glenn C. Loury, *Double Talk*, THE NEW REPUBLIC, Aug. 25, 1997, at 23; Orlando Patterson, THE ORDEAL OF INTEGRATION, at 192-193; Nathan Glazer, cited in GRAHAM, *supra* note xx, at 132.

²⁷⁹ African-Americans have, at times, protested at the diminishment of their share of the affirmative action pie caused by admission of other beneficiary groups. However, Black leadership groups have consistently espoused solidarity between "people of color." Such coalition-building serves broader political interests, but may also reflect a calculation that affirmative action would be vulnerable if Blacks were the only beneficiaries. Studies have also shown that African-Americans would be loathe to assume the stigma of being the *only* group singled out for special benefits. David Sabbagh, *Affirmative Action Policies: An International Perspective* (unpublished paper on file with the author).

“politically feasible and socially desirable.”²⁸⁰ Powell’s solution in *Bakke* was to advance a model of “pluses” awarded based on an individualized assessment of each applicant’s diversity contribution. Powell’s approach thus preserves a symbolic commitment to individualism, maintaining the illusion that everyone can compete equally with no group enjoying a superior *a priori* claim.²⁸¹ Likewise, *Croson*’s disparity testing reduces group entitlement to a question of statistics in which no group appears to be *a priori* favored and findings of disadvantage are localized within a particular context. These approaches run directly contrary to the Indian approach of targeted reservations based on explicit reckonings of comparative societal disadvantage.

E. Purposeful Confusion

This Article has thus far deferred discussing the underlying normative theories that govern affirmative action. However, if we are to understand “race” in the functional manner that this Article proposes, clarity as to rationale is essential. In India, the rationale for affirmative action is fairly well-defined: to remedy the societal effects of caste discrimination. Such normative clarity permits India to concentrate on identifying beneficiaries in a precise and transparent fashion.

By contrast, five decades into affirmative action, America has yet to reach consensus on what such programs seek to accomplish. Affirmative action crept into our public life almost without debate and then proliferated in an atmosphere of racial crisis. An original focus on remedying historical injustice expanded to embrace broader objectives. Yet, despite a now substantial body of affirmative action case law, the range of constitutionally

²⁸⁰ *Bakke*, 438 U.S. at 297.

²⁸¹ See Sean Pager, *Strictness & Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice*, 26 B.C INT’L & COMP. L. REV. 35 (2003) (comparing similar approach taken by ECJ).

permissible rationales in the US remains uncertain.²⁸² Affirmative action in the US is thus characterized by normative indeterminacy, with different people ascribing to it very different aims.²⁸³

Such uncertainty hampers our ability to answer the Who Question. Talking about *who* requires a normative theory as to *why*. A big reason we don't talk about the *who* may be because we cannot agree on the *why*. We have at least two different sets of rationales—diversity and remedy—whose various strands and formulations are themselves subject to considerable ambiguity. If you press these ambiguities, they point you in different directions as to which groups you might select as beneficiaries.

The diversity rationale, in particular, encompasses a dense thicket of overlapping goals. Justice Powell's original account of diversity in *Bakke* contemplated a kind of Noah's Ark in which universities seek the student body equivalent of "two of everything," with race functioning as only one "plus" factor among many in the quest to showcase the full taxonomic variety of human kind.²⁸⁴ The Michigan Law School plan upheld in *Grutter* departs from this model by focusing almost exclusively on ensuring that certain racial groups were fully represented in "critical masses," while making no real allowance for diversity from any other source, ethnic or otherwise.²⁸⁵

The theoretical basis on which *Grutter* defends diversity also presents a far muddier account of the project. It moves from *Bakke*'s emphasis on the heuristic benefits of diversity as an educational tool to a

²⁸² Indeed, if anything, *Grutter* made the picture less clear when it opened the door to as-yet untested rationales by disowning previous language in *Croson* suggesting that only past discrimination could justify racial preferences. Cunningham, *supra* note xx, at 672.

²⁸³ For example, defenders of racial preferences commonly invoke justifications such as role models and service to minority communities which the Supreme Court has seemingly rejected. See, e.g. Brest & Oshige, *supra* note xx, (defending such a broader reckoning of normative aims).

²⁸⁴ *Bakke*, 438 U.S. at 322-23.

²⁸⁵ *Grutter*, 539 U.S. at 330.

novel account of its function in legitimizing elite institutions. Along the way, it also defends diversity as providing a civics lesson in “cross-racial understanding,” a response to globalization, and a public service to corporate recruiters.²⁸⁶ Taken literally, each of these normative theories has different implications for the groups who would be included.

The problems posed by immigration prove particularly vexatious. Because such new arrivals often lack a history of persecution on US shores, their inclusion in affirmative action has stirred occasional controversy.²⁸⁷ However, just as the original categories have expanded to embrace new additions, the rationales for affirmative action have been similarly stretched to accommodate them.²⁸⁸

Should foreign-born immigrants count for diversity purposes? It depends on what you think diversity is designed to accomplish. If it’s to expose students to a kind of model UN which helps them compete in the global marketplace, then the more immigrants the better. And why limit it to immigrants of color? Alternatively, if it’s the “unique experience of being a racial minority” *in the US* which we seek to bring into the classroom, then immigrants may not serve the purpose as well, if their formative years were spent elsewhere. This is not an abstract question. The University of Texas explicitly excluded Black immigrants from affirmative action.²⁸⁹ Evidence that children of African and Caribbean immigrants are

²⁸⁶ *Id.* at 306.

²⁸⁷ See GRAHAM, *supra* note xx, at 132 (quoting Lawrence Fuchs, a prominent civil rights thinker, as describing the inclusion of immigrants as “a historical accident for which there is no possible justification”); see also ORLANDO PATTERSON, *ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* 193 (1998); EDLEY, *supra* note xx, at 176.

²⁸⁸ See Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677; GRAHAM, *supra* note xx, at 195.

²⁸⁹ *Hopwood*, 78 F.3d at 936 n.4 (describing Texas’ admissions preferences as applying only to “American blacks,” but not “a black citizen of Nigeria”). And at least one federal court of appeals has questioned giving “African-American a hemispheric meaning.”

displacing descendents of Negro slavery in elite universities has caused concern elsewhere.²⁹⁰

Other theories of diversity point to similarly conflicting prescriptions. For example, *Grutter* emphasized the value of diversity as an agent of societal legitimization by demonstrating that “the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity.” Presumably, this “demonstration” is aimed most directly at the specific groups whose representation is being furnished. Therefore, a legitimization model argues for a definition of group boundaries determined by the group itself because the model would only work to the extent that the group accepted the admittee as its own. By contrast, the rationale of promoting “cross-racial understanding” and breaking down stereotypes would push in the direction of an externalized view of race because the stereotypes being targeted are held by outsiders. Depending on which perspective you adopt, you might end up with very different groups.²⁹¹

Similar ambiguities arise under a remedial rationale. This paper has advocated defining beneficiaries based on the contours by which discrimination is targeted. One might ask, however, from whose perspective is such “targeting” assessed: the victim, the perpetrator, or some “objective” observer?²⁹² Courts have sometimes assumed a “bigot’s-eye

Podberesky v. Kirwan, 38 F.3d 147, 159 (4th Cir. 1994) (questioning award of racial scholarship to student from Jamaica).

²⁹⁰ See *supra* note xx. A similar controversy has arisen over foreign-born “minority” faculty hires. GRAHAM, *supra* note xx, at 162 (reporting that 56% of University of Michigan’s Asian faculty were foreign born and over half of all Stanford’s “minority” hires).

²⁹¹ See McGowan, *supra* note xx, at 135 (describing asymmetries in perceptions of racial identity). Normally, one would expect group insiders to make finer distinctions. *Id.* at 133-34. But see Lee, *supra* note xx, at 184 (describing study in which African-Americans accepted Black immigrants as “Black,” but Koreans merchants distinguished them).

²⁹² Of course, in practice, we may have very little information about the actual

view” governs.²⁹³ However, what if the perpetrator was mistaken or oblivious to the racial identity of his victims?²⁹⁴ To answer, we need a clearer idea of what the remedy is designed to do. For example, to “make whole” an aggrieved community, one might assume an insider perspective to appease those whom the community regards as its own. A prophylactic aim would push toward the bigot’s eye view because you need to know who’s next in line.²⁹⁵ Or if the only point is corrective justice with respect to individual, but unidentified victims, one might simply draw the narrowest class who might plausibly have been harmed.

As with diversity, particular problems arise with respect to immigration. For example, a city may have enacted a remedy based on identified disparities in a Hispanic population composed mostly of Puerto Ricans. Whether Guatemalans migrants arriving after the remedy was enacted should share its benefits depends on the purpose of the remedy. Under a strictly retrospective view, one might argue that including Guatemalans who have not actually suffered the discrimination could violate narrow tailoring.²⁹⁶ However, if one considers the remedy as designed to counteract ongoing patterns of discrimination then Guatemalans

targeting in so far as the “discrimination” is only inferred from statistical disparities.

²⁹³ See *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3d Cir. 1991) (defining race from external perspective of discriminators); *Montana Contractors*, 460 F. Supp. at xx.

²⁹⁴ *Cabbie Slain in Shooting, Fiery Crash*, S.F. CHRON., Aug. 5, 2002 at B1 (describing Sikh mistaken for Arab). Racial animus need not be triggered by specific stereotypes or racial hostility—it might be enough that the victims were simply of a visibly different background and regarded as “the other.” Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being 'Regarded As' Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283 (2005).

²⁹⁵ Cf. *amicus* scholars, *supra* note xx, at 872 (suggesting that selecting on the basis of externally visible differences “makes sense if the primary purpose . . . is to provide a prophylactic against anticipated future [discriminatory] behavior”).

²⁹⁶ Including subgroups who may not have been present at the time the discrimination was measured, on a purely retrospective view could be equated to Richmond’s Aleuts. See *supra* notes xxx and accompanying text.

might be justifiably included to the extent such prejudice is likely to impact them in the future.²⁹⁷

Case law on this question has been ambiguous. *Croson* was premised on an explicitly retrospective rationale that criticized Richmond for including groups who had not “actually suffered” the discrimination being remedied. However, courts have expressed differing views as to whether a prophylactic remedy is precluded in other cases.²⁹⁸ At root lies the undertheorized nature of racially-targeted remedies. As anomalies within the dominant individualist tenor of US equality law, existing jurisprudence has yet to fully come to grips with their meaning.²⁹⁹

There are also fundamental ambiguities as to the meaning of “discrimination” itself. Courts usually cognize racial prejudice in terms of hostile acts of bigotry by identifiable individuals. Their rejection of societal rationales for affirmative action stems in part from an aversion to notions of racial guilt or entitlement.³⁰⁰ Cabining the Who Question within particularized contexts serves this ideological project, but fails to address more ambiguous structural barriers *within* such contexts.³⁰¹

²⁹⁷ But see EDLEY, *supra* note xx (raising a “coming to the nuisance” rationale for excluding such immigrants.)

²⁹⁸ Compare *Peightal v. Metro. Dade County*, 940 F.2d 1394, 1408-09 (11th Cir. 1991), *Ritchey Produce Co. v. State*, 707 N.E.2d 871 (Ohio S.up. Ct.,), with *Assoc. Gen'l Contractors of Ohio*, 214 F.3d 730 (retrospective critique of same program).

²⁹⁹ Justifications for such group remedies have been hinted at in earlier Title VII cases, but never definitively established. Compare *Int'l Brotherhood of Teamsters v. United States*, 321 U.S. 324, 364-67 (1977) (purpose of group remedy limited to reaching actual or potential victims of past discrimination) with *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 449-50, 477 (1986) (broader prospective goals of reforming internal dynamics to remove ongoing barriers to minority advancement).

³⁰⁰ Cf. *Croson*, 488 U.S. at 528 (Scalia, concurring); Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From Bakke to Grutter and Beyond*, 30 HASTINGS CON. L.Q. 445 (2003).

³⁰¹ Such barriers may or may not reflect racial prejudice, and their implications remain undertheorized. Similarly, a categorical tailoring model presupposes targeted bigotry directed against identifiable groups. Yet, racial disparities often result from “Old Boy networks” which benefit insiders out of self-interest more than discriminatory animus against any particular “out” group. Existing doctrine fails to account for such a model, and

These ambiguities in the rationales used to justify US affirmative action limit our ability to answer the Who Question with any precision.³⁰² To choose between divergent approaches, we would have to commit to a normative theory of affirmative action, a task the Supreme Court has managed to avoid.³⁰³ Our current methodology elides the question of rationale, allowing us to remain agnostic. We simply count heads without questioning whom we're counting or why.

All of this suggests that there may be the sound reasons to avoid pressing the Who Question too far if the benefits of precision and clarity may come at too high a price. Of course, some would argue that the solution lies in the abolition of racial preferences all together. Yet, for better or worse, race-consciousness remains a project to which our nation seems committed for the foreseeable future. Affirmative action arguably fulfills a vital role in our national politics, serving as a form of collective atonement for our racial sins. The failure of the Gingrich Revolution to repeal federal affirmative action (something that the current Republican majority has never even touched since) signaled that even conservatives have grudgingly accepted this *fait accompli*.³⁰⁴ We might not be able to agree on the precise objectives, but the overall direction remains fixed.

courts have disagreed as to its remedial implications. *Compare Adarand Constructors, Inc.*, 965 F. Supp. 1556 with *Concrete Works*, 86 F. Supp. 2d 1042.

³⁰² There are, in any case, practical limits to the precision that can be achieved in assessing pathways of racial targeting or diversity values. However, the ambiguities as to purpose prevent us from even trying.

³⁰³ See Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 Ohio St. L. J. 79, 81 (1994) (describing incoherence resulting from Supreme Court majorities “papering over strong philosophical differences”).

³⁰⁴ See *id.* (describing “broad societal acceptance” of affirmative action). This is not to deny that race-conscious affirmative action remains controversial nor that efforts at abolition continue. See Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 Whittier L. Rev. 3, 6-7 & n.24 (1999) (describing repeals of affirmative action through voter initiative); see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 1049 (describing the ‘Texas 10’ race neutral alternative).

When there are no good answers, sometimes it's better to leave our options open. Intentionally opaque rulings can serve as a judicial strategy to avoid entering unnecessarily divisive territory and preserve a space for political compromise.³⁰⁵ Commentators often cite Justice Powell's *Bakke* opinion as Exhibit A. As they see it, Powell's opinion represents a carefully crafted formula that finesses the most objectionable and problematic aspects of affirmative action.³⁰⁶ By preserving a symbolic commitment to individualism, the opinion masks the realities of racial preferences in what many have hailed as an act of statesmanlike genius.³⁰⁷

Some see *Grutter* and *Gratz* as continuing this legacy. The opinions continue to pay rhetorical homage to flexibility and individuality, while glossing over the problematic issue of "critical masses" and culminating in split outcomes that seem to reward opaqueness over transparency.³⁰⁸ *Croson* contains its own jurisprudential genuflection to individualism, by requiring provisions for waivers and challenges on a case by case basis.³⁰⁹ *Croson* also exploits crucial ambiguities as to the meaning of its "prima facie" showing of discrimination and the degree of state involvement contemplated by its "passive participation" theory.³¹⁰

³⁰⁵ Pildes & Niemi, *supra* note xx; Sunstein, *supra* note xx, at 1315.

³⁰⁶ See Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263 (2000) (summarizing commentary).

³⁰⁷ See, e.g. David Sabbagh, *The Judicial Uses of Subterfuge*, 118 POL. SCI. Q. 411, 419, 433 (2003) (arguing "affirmative action . . . being . . . a deliberate attempt at reducing the degree of racial identification in the United States must be concealed in order to achieve its intended effect"); Robert Post, *Intro: After Bakke*, 55 REPRESENTATIONS 4 (1998).

³⁰⁸ See Cunningham, *supra* note xx, at 676.

³⁰⁹ See *Croson*, 488 U.S. at 508. Use of such procedures would be rare. The challenge procedure, in particular, would seem almost impossible to substantiate. Yet, they serve a symbolic function in reassuring us that flexibility and individualized review remain sanctified values.

³¹⁰ See generally Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998).

Arguably, each of these gray areas represent carefully negotiated political compromises perpetuated in the Court's case law. Avoiding a sharp resolution of the Who Question may be another example where such strategic ambiguity serves a positive value. Powell's rejection of societal rankings epitomizes the determination of the Court to eschew the divisive effect of resolving competing claims to racial injustice. By creating the illusion that no group enjoys a superior *a priori* claim to "diversity," Powell's *Bakke* opinion implicitly denies the societal reality of race. *Croson*'s reliance on "objective" indicia of disparities similarly avoids any need to look behind the numbers. It's not that the Court cannot choose between groups, but that it chooses not to.

III. Finding the Balance

This paper has suggested there may be reason to hesitate before pushing the Who Question too far. The argument for ambiguity, however, is based on a tradeoff between competing values, and where we draw the line is open to debate. The risks in raising the Who Question does not mean we should give up and accept the quadrangle as a *fait accompli*. Even if India's methodology is not the answer to our Who Question, it might have more modest uses. And if we can't agree on a single answer, we should at least think about *who* should be making the decisions.

A. India Revisited—à la Carte

Although we may reject India's approach as an alternative to *Croson*, there remain features of the Indian model that we *could* benefit from adopting with respect to definitional issues. *Croson*'s disparity analyses remains a black box whose output is only as reliable as the data we input. Measuring underrepresentation using our current categories does not tell us much because these categories are not narrowly tailored to answer

the questions we ask of them. India's example offers several ways the status quo could be improved.

For example, even if we continue to count heads under an underrepresentation model, it would not hurt to follow the Indian practice of disaggregating categories to their logical limit. Where underrepresentation is measured on a national scale, it makes no sense to collect data using only a few broad categories.³¹¹ Even in local contexts, where particular ethnic groups have a strong presence and a distinct identity, cities should consider counting them separately where possible.³¹²

Working with narrower categories would minimize definitional ambiguities: It's much easier to agree on who is Iberian or Argentinean than who is Hispanic, as national origin provides a stable reference point.³¹³ Counting with smaller units would also permit more narrowly-tailored remedies to be drawn, preventing Iberians from usurping benefits at the expense of Puerto-Ricans. Some universities already make such distinctions. The University of Hawaii targets only selected Asian Pacific subgroups for diversity admissions. Stanford limits Hispanic eligibility to *Chicanos* and Puerto Ricans.³¹⁴ Such practices should be expanded.

This is not to deny the relevance of broader racial identities or to attempt to replace race with ethnicity.³¹⁵ It is simply to recognize that race

³¹¹ Incredibly, the federal government's most recent disparity study did not even bother to disaggregate that far. See Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed Reg 26,042 (May 23, 1996) (calculating underrepresentation of "minorities" as a single masse).

³¹² In other words, choose the narrowest categories of ethnic identity to which the sociopathology of stereotyping and discrimination might conceivably be responsive and for which statistically meaningful results can be obtained.

³¹³ There would admittedly still be definitional challenges posed by multiples migrations. Cf. *Bennun*, 941 F.2d at 173. However, such inevitable controversies can be resolved on a case by case basis.

³¹⁴ Brest & Oshige, *supra* note xx, at 892-93.

³¹⁵ Data compiled based on subgroups can always be reconstituted to provide a picture of the larger group.

itself is contextually contingent and that the salient contours of racial identity vary. Disaggregation would challenge the assumption that the quadrangle represents the only organizing paradigm by which race can be viewed, undermining monolithic assumptions about racial identities and perhaps helping us to transcend them.

India's example also underscores the importance of attentiveness to societal context.³¹⁶ Affirmative action categories should reflect patterns of regional disadvantage, even if this means departing from quadrangular conventions.³¹⁷ French-Acadians have a history in Louisiana that justifies distinguishing them from Whites. Likewise, counting Native Hawaiians separately makes sense in Hawaii. Even non-ethnic groups such as Appalachian Whites may deserve special attention.

Finally, there is no reason why such categories could not be informed by empirical data of the sort India relies on. New York's dilemma over whether to count Iberians as Hispanic is one that countless other jurisdictions continue to face: deciding who qualifies as a "minority." An empirical approach, even if imperfect, could provide a metric to draw definitional lines that would at least be preferable to relying on the uninformed intuition of judges and federal bureaucrats.³¹⁸

Iberians represent an easy case being as much European as Hispanic. However, it's time to challenge presumptions of affirmative action eligibility that turn solely upon "non-White" status. Particularly in economic contexts such as public contracting, there seems little justification for awarding blanket preference to socio-economic overachievers such as

³¹⁶ Cf. *Grutter*, 539 U.S. at 325 (context matters in racial equality cases).

³¹⁷ See EDLEY, *supra* note xx, at 175

³¹⁸ Cf. Sunstein, *supra* note xx, at 1313-1314 (urging greater attention to empirical facts in affirmative action jurisprudence).

East and South Asians.³¹⁹ This is not to deny that even successful minority groups face instances of racial prejudice. Yet, existing discrimination law affords them retrospective relief.³²⁰ The extraordinary remedy of voluntary affirmative action should be reserved for those who face more intractable racial barriers. Only persistent ingrained racism provides a justification for acting proactively as well as a principled basis for privileging this form of “diversity” over all others.

That said, relying on Indian methodology to definitively identify subordinated groups may be impractical. A more modest goal would be to rely on societal data to rule out groups which are clearly *not* being “held back” on account of race and focus on those which might be. Thus, rather than making societal disadvantage the sole determinant of eligibility, as in India, such societal selection would serve only as a threshold test to refine the categories we count with in particular contexts. By constructing racial categories confined to at least plausibly disadvantaged minority groups, we would make more tenable *Croson*’s blind equation of underrepresentation with discrimination.³²¹

Such socio-economic analyses need not culminate in a formalized set of rankings, nor be treated as dispositive. Indeed, the problem with India’s approach may have as much to do with its reliance on high-profile, winner-takes-all contests as with its underlying aims. As a starting point,

³¹⁹ See, e.g. Timothy Bates, *The Changing Nature of Minority Business: A Comparative Analysis of Asian, Nonminority, and Black-Owned Businesses*, 18 REV. BLACK POLI ECON. 25, *supra* note xx at 26 (1989) (“Asians are *not* a disadvantaged group: their eligibility for government minority business set-aside[s] . . . is completely inappropriate”).

³²⁰ The mere possibility of discrimination seems inadequate to support a presumption of entitlement. Arab-Americans also face discrimination; so do Hasidic Jews. But these groups are generally denied affirmative action. How are Indian-Americans any different?

³²¹ Indeed, we already make such distinctions. If tomorrow Swedish contactors happened to be found statistically underrepresented in New York, a court would think long and hard before presuming discrimination from such *prima facie* evidence because Swedish are not seen as a racially subordinated group. There seems no reason to award such a presumption to other highly successful minority groups.

we could begin merely by making sure we gather the necessary data broken down by subgroup and funding social science research to interpret it. Such research should also examine more carefully the links between immigration and ethnic disadvantage to help control for “immigration effects” and enable a more meaningful debate on immigrant participation in affirmative action.³²² Policy responses to the findings that emerge could then be determined on a program by program basis.

All of these steps would serve to alleviate the “narrow tailoring” concerns that judges have increasingly raised as constitutional roadblocks to affirmative action. We’ve been painting our racial landscape in primary colors for too long. It’s time to take a more chromatically differentiated view which takes note of the ever more diverse spectrum of hues represented in our citizenry. India’s example offers a useful starting point to accomplish this.

B. Who Decides the Who Question?

This Article has suggested ways that our current approach could be improved. However, perhaps the more pressing question is to think about how we might get there and, in particular, whether change can be better achieved through law or politics. In other words, who should decide the Who Question? Here too, India offers an instructive example.

There is a natural tendency to constitutionalize equality issues.³²³ Recent case law suggests this process is well under way for the Who Question. Constitutionalizing the Who Question means vesting key decisions with courts, restricting the license for institutional

³²² See Hugh Davis Graham, *Affirmative Action for Immigrants: The Unintended Consequences of Reform*, in *COLOR LINES*, at 54-55 (noting dearth of scholarly analysis or empirical data exploring connections between immigration and affirmative action).

³²³ Cf. *Bush v. Gore*, 531 U.S. 98 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993). Indeed, some argue there is a tendency in America to constitutionalize every contentious issue.

experimentation and increasing the demand for precision and clarity. Yet, as this Article has suggested, searching for a single, definitive answer in this manner might prove infeasible and/or unwise.

In an ideal world, individual affirmative action programs would tailor their answers to their specific needs in an evolutionary process that would permit a new consensus on race to emerge organically.³²⁴ There is some suggestion of such incremental change. As Rocco Luiere bears witness, the meaning of “Hispanic” is being challenged by a new *Latino* identity that excludes Iberians and is more overtly “racial” than “ethnic.”³²⁵ A similar effort can be seen in the emerging distinction between “Afro-Americans”—the “original” African-American descendants of former slaves—and Black immigrant groups.³²⁶

Yet, such departures from quadrangular orthodoxy remain more the exception than the rule. While Pacific-Islanders may have won Census recognition as an independent group, most affirmative action programs still lump them together with other Asians. Without external prompting, such programs have little incentive to change as adherence to quadrangular orthodoxy remains the path of least resistance.³²⁷ Efforts to dislodge any of the established groups from their privileged position have met fierce resistance.³²⁸ Such changes as do occur may be more politically motivated

³²⁴ Cf. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001); *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³²⁵ See Ian F. Haney-Lopez, *The Birth of a ‘Latino Race,’* LOS ANGELES TIMES, December 29, 2004, at B11 (describing a growing trend among *Latinos* to identify as a distinct race).

³²⁶ Patterson, *supra* note xx.

³²⁷ See *supra* notes xxx.

³²⁸ See *id.*; LaNoue & Sullivan, *supra* note xx, at 441 (relating anecdote about proposed removal of Asian-Americans and Indians from list of “official minorities”—nobody disagreed on the merits, but the Chairman was “unwilling to take the political heat that the removal would generate”); LaNoue, *supra* note xx (describing opposition to *Crosby* studies that get the “wrong” answer).

than based on objective merits.³²⁹ Affirmative action is not supposed to be an ethnic spoils system. Yet, the political economy of ethnic identities clearly operates in a far from optimal manner.

There is therefore a case for a “market regulator” in the form of legal compulsion. By forcing the Who Question under the rubric of strict scrutiny, courts have challenged the complacency of the status quo. As we have seen, such judicial skepticism has taken many different avenues, exposing the quadrangle’s flaws on many levels.³³⁰

Yet, such criticism often fails to acknowledge the inherent difficulty of conforming ambiguous and subjective questions of racial identity to precise judicial standards. Race is messy. To normalize it within fixed categories, you have to impose an artificial rigidity on what are inherently fluid identities.³³¹ Such arbitrary decisions are not the sort of thing that can be easily justified under heightened standards of scrutiny.³³² Moreover, as Justice Powell noted, courts are not institutionally suited to perform such “variable sociological analyses.”³³³

This Article has suggested several reasons to refrain before pushing the Who Question too far. The “identities market” may be imperfect, but a judicially mandated “command and control” approach could do more harm than good. However, even if we agreed to consign the Who Question to the realm of politics, it is difficult to see how such a laissez faire model can be squared with current constitutional doctrine. When it comes to race, the Court has made it clear that the Equal Protection Clause has no tolerance for

³²⁹ See *supra* notes xx.

³³⁰ See *supra* notes xx.

³³¹ See YANOW *supra* note xx, at viii, 150; cf. JENKINS, *supra* note xx, at 67-68 (making similar argument regarding classification of identities in general).

³³² If every Rocco Luiere can invoke strict scrutiny and force a city to justify its choice of affirmative action categories as objectively justified and narrowly tailored for every possible subgroup included or omitted, strict review could become fatal in fact, contrary to *Adarand*’s assurances. The challenge is to find a principled stopping point short of that.

³³³ *Bakke*, 438 U.S. at 297.

“the product of rough compromise struck by contending groups within the democratic process.”³³⁴

The Who Question is thus caught in a catch-22. While courts remain loathe to tackle the imponderables of race and are ill-equipped to do so, strict scrutiny permits little leeway for them to defer to anybody else. The Supreme Court appears to deal with this problem primarily through avoidance and indirection. Many lower courts have been similar equivocal and ambivalent.³³⁵ Yet, as courts more ideologically hostile to affirmative action begin to tackle the Who Question in earnest, the irreconcilable ambiguities of race are becoming dangerously exposed.³³⁶

Fortunately, the dichotomy between “law” and “politics” need not be as stark as current doctrine suggests. India offers an alternative that bridges the two extremes. Courts are hardly the only institutional actors qualified to administer a rule-based regime. India’s approach to the Who Question instead emphasizes an administrative model. Although the Indian Supreme Court remains an active protagonist in shaping constitutional doctrine governing caste reservations, the Court has recognized that the selection of affirmative action beneficiaries is primarily a political decision. It has confined the role of the judiciary to articulating the principles that bound the exercise of political discretion and ensure that the selection process is conducted in an objective, transparent manner, pursuant to established standards.³³⁷

There is already a precedent for this kind of intermediate approach

³³⁴ Bakke 438 U.S. at 299 (opinion of Powell, J.).

³³⁵ See *supra* note xxx.

³³⁶ Indeed, *Croson* itself is partly to blame for this. Its tentative foray into categorical tailoring issues by harping on Richmond’s Aleuts opened a Pandora’s box. Policing for “random inclusiveness” now features as a staple of lower court narrow tailoring analysis although the meaning of “random-ness” remains woefully undertheorized.

³³⁷ See *Indra Sawhney*, 3 S.C.C. 217 (endorsing proposed weighting of 11 socio-economic factors as exemplar of “objective” assessment of disadvantage, while not precluding comparable alternatives).

within the US equal protection case law on race-conscious voter districting, which itself represents the political equivalent of affirmative action.³³⁸ The US Supreme Court has recognized that drawing election districts is a political exercise in which courts should hesitate to intervene.³³⁹ To ensure this discretion is respected, the Court has declared that the consideration of race in drawing of district boundaries will not automatically render such decisions suspect.³⁴⁰ Instead, the Court will apply strict scrutiny only where racial considerations so override “traditional districting principles” that a racial gerrymander becomes manifest.³⁴¹

US courts could undertake a similar role with respect to the Who Question—requiring only that affirmative action categories be chosen through a transparent process and conform to “categorical tailoring” principles, analogous to traditional districting. Judicial interventions would be justified only when the results are manifestly inconsistent with these basic guidelines or otherwise exhibit indicia of favoritism.³⁴² Such tailoring principles could be developed in common law fashion through experience. As a starting point, some of the suggestions this Article has made could be adopted: e.g. requiring disaggregation into subcategories where feasible, eliminating “forward” subgroups, controlling for immigration effects, and

³³⁸ Farber, *supra* note xx, at 924 (describing efforts to create majority minority districts to boost election of minority candidates); cf. Jenkins, *supra* note xx, at 756 (describing quotas for political representation as part of Indian affirmative action). Both race-conscious districting and affirmative action involve classifications used to sort participants (voters or beneficiaries) into discrete categories based on their affiliation with an identified community. The key difference with districting is that it operates on a facially race-neutral basis: Voters are assigned to a district based on their residence, a criterion that may be only indirectly linked to ethnicity. However, the Supreme Court has held that racial gerrymanders, where sufficiently blatant, can be deemed equivalent to facial classifications by race. *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

³³⁹ See *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993).

³⁴⁰ *Miller*, 515 U.S. at 905.

³⁴¹ *Id.* (identifying such principles as compactness, contiguity, and respect for existing communities)

³⁴² Cf. *Jana-Rock*, 2006 U.S. App. Lexis 4050 at *46 (scrutinizing construction of Hispanic category for signs of favoritism).

focusing on regional context.³⁴³ Courts have already begun to tinker with several such steps.³⁴⁴ This proposal would merely unify their efforts under a coherent doctrinal rationale. As with the voter districting cases, the substance and scope of such judicial review might prove erratic, although perhaps no worse than the present status quo. In any case, this Article has already suggested that when it comes to the Who Question, there are benefits to ambiguity as well as costs.³⁴⁵

IV. Conclusion

Affirmative action in the US has avoided the Who Question for too long. We continue to count heads using outdated and overinclusive categories without thinking about what we are doing or why. Non-disadvantaged groups such as Iberians benefit from affirmative action, while Samoans and Laotians are denied admission to college because there are “too many Asians.” More is at stake here than just somebody’s job, contract, or university slot. Racial equality remains a core moral issue in this country. And the construction of affirmative action categories is freighted with issues of personal identity whose outcome will determine how we think of ourselves as a people. Therefore, if we are going to continue to do affirmative action by the numbers, it’s worth thinking about counting the ones that matter most.

As courts increasingly force the issue under the rubric of strict scrutiny, shades of gray on questions of color can no longer be papered over. Yet, such cases also demonstrate that we lack the doctrinal and

³⁴³ See *supra* notes xx and accompanying text.

³⁴⁴ See *supra* notes xx and accompanying text.

³⁴⁵ Cf. Sunstein, *supra* note xx, at 1315-16 (describing benefits of Supreme Court’s “casuistical, rule-free, fact-specific course in the context of affirmative action” as simultaneously provoking public debate through incremental rulings while leaving space for democratic resolution of underlying issues).

methodological tools to tackle this problem. India offers an alternative model that we can usefully consider before continuing down this road, both to emulate—and to avoid.